Supreme Court, U. S.
FILED
APR 30 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK, ATTORNEY GENERAL ..... PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL ..... RESPONDENTS

APPENDIX

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FILED SEPTEMBER 3, 1974
CERTIORARI GRANTED MARCH 17, 1975

IN THE

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THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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1-10-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion for Extension of Time to Answer or Otherwise Plead to March 5, 1973.

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3- 6-73 Motion for Extension of Time to Answer or Otherwise Plead filed by defendants represented by United States Department of Justice.

3-7-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion For Extension of Time to Answer or Otherwise Plead to March 12, 1973.

3- 5-73 Brief in Support of Motion to Dismiss or for Summary Judgment filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

3-13-73 Motion For Extension of Time to Answer or Otherwise Plead filed by defendants represented by United States Department of Justice.

3-14-73 Order entered in United States District Court For the Western District of Kentucky granting defendants' represented by United States Department of Justice Motion For Extension of Time to Answer or otherwise Plead to March 16, 1973.

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3-16-73 Memorandum in Support of Motion to Dismiss filed by defendants represented by United States Department of Justice.

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4-16-73 Response to plaintiff's Motion for Summary Judgment filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

5- 2-73 Memorandum of Amicus Curiae Commonwealth of Virginia in Support of Plaintiff filed by Attorney General, Commonwealth of Virginia.

6-15-73 Supplement to Brief filed by defendants Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

6-28-73 Supplemental Brief filed by plaintiff Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

7- 9-73 *Oral Arguments,* United States District Court For The Western District of Kentucky.

7-26-73 Memorandum Opinion tendered by defendants

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7-30-73 Memorandum tendered by defendants represented by United States Department of Justice.

9- 7-73 Motion to Dispense with Appeal Bond filed by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

9-24-73 Order entered United States Court of Appeals for the Sixth Circuit exempting plaintiff-appellant Commonwealth of Kentucky from filing a bond for costs on appeal.

10-12-73 Record on Appeal Transmitted from United States District Court to United States Court of Appeals For the Sixth Circuit.

10-31-73 Record on Appeal docketed by United States Court of Appeals For the Sixth Circuit as No. 73-2099.

11- 2-73 Entry of Appearance by Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

11- 2-73 Appendix Designation by plaintiff-appellant Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General.

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12- 4-73 Brief of California Attorney General as Amicus Curiae in Support of Appellant's Interpretation of the Clean Air Act filed by Attorney General, State of California.

12- 7-73 Order of United States Court of Appeals For the Sixth Circuit Deferring filing of Appendix to December 17, 1973.

12-11-73 Brief of Commonwealth of Virginia as Amicus Curiae in Support of Plaintiff-appellant filed by Attorney General, Commonwealth of Virginia.

12-14-73 Brief filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

12-14-73 Appendix filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

1- 8-74 Typewritten Brief filed by appellees represented by United States Department of Justice.

1-14-74 Brief filed by appellees Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss.

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1-22-74 Brief filed by appellees represented by United States Department of Justice.

1-22-74 Reply Brief filed by appellant Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

3- 5-74 Brief of Amicus Curiae State of Texas in Support of Appellants filed by Attorney General, State of Texas.

3-18-74 Order granting State of Texas Motion to File Brief Out of Time.

4- 8-74 Oral Arguments, United States Court of Appeals For the Sixth Circuit.

9- 3-75 Petition For Writ of Certiorari filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, in United States Supreme Court, No. 74-220, for Review of Judgment of United States Court of Appeals For the Sixth Circuit rendered in proceedings on June 5, 1974.

9- 3-74 Petition For Writ of Certiorari docketed as No. 74-220.

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9- 3-75 Entry of appearance by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Atttorney General.

11- 1-74 Supplemental Memorandum filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

1-10-75 Memorandum for Respondents filed by respondents by Solicitor General. U. S. Department of Justice.

3-24-75 Request for transmittal of record from United States Court of Appeals For the Sixth Circuit.

3-27-75 Designation of Record to be included in Appendix and Statement of Issues filed by petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General.

Filed — 11-16-72

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
LOUISVILLE, KENTUCKY

COMMONWEALTH OF KENTUCKY,
EX REL ED W. HANCOCK,
ATTORNEY GENERAL ..... PLAINTIFF,

VS:-

Civil Action
No. 7480-G

COMPLAINT

WILLIAM D. RUCKELHAUS, Administrator,
Environmental Protection Agency,
Waterside Mall, Fourth and M Streets,
Washington, D.C., 20460;

JACK E. RAVAN, ADMINISTRATOR,
REGION IV,
Environmental Protection Agency,
Suite 300, 1421 Peachtree Street, N.E.,
Atlanta, Georgia, 30309;

ENVIRONMENTAL PROTECTION AGENCY,
United States of America,
Waterside Mall, Fourth and M Streets,
Washington, D.C., 20460,
AND Also Serve for the above defendant agency:

Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

GENERAL CREIGHTON ABRAMS, CHIEF OF STAFF,
United States Army, United States of America,
The Pentagon,
Washington, D.C., 20301,

ROGERT F. FROEHLKE, SECRETARY,
Department of the Army,
United States of America,
The Pentagon,
Washington, D.C., 20301;

MAJOR GENERAL W. R. DESBORY,
COMMANDING GENERAL,
United States Army Armor Center and Fort Knox,
Fort Knox, Kentucky, 40201;

MAJOR GENERAL JOHN CUSHMAN,
COMMANDING GENERAL,
101st. Airborne Division (Airmobile) and Fort Campbell, Fort Campbell, Kentucky, 42223;

COLONEL ERNEST A. VULVEY, JR.
COMMANDING OFFICER,
Lexington-Bluegrass Army Depot,
Department of the Army,
Lexington, Kentucky, 40507;

DEPARTMENT OF THE ARMY,
United States of America,
The Pentagon,
Washington, D.C., 20301,
AND Also Serve for the above defendant agency:
Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

AUBREY J. WAGNER, CHAIRMAN,
BOARD OF DIRECTORS,
Tennessee Valley Authority,
Woodward Building,
15th and H Streets, N.W.,
Washington, D. C., 20444;

LYNN SEEBER, GENERAL MANAGER
Tennessee Valley Authority,

Woodward Building,
15th and H Streets, N.W.,
Washington, D.C., 20444;

J. L. McPHERSON, SUPERINTENDENT,
SHAWNEE POWER PLANT
Tennessee Valley Authority,
Paducah, Kentucky, 42001;

T. E. CAVANISS, SUPERINTENDENT,
PARADISE POWER PLANT,
Tennessee Valley Authority,
Drakesboro, Kentucky, 42337;

TENNESSEE VALLEY AUTHORITY,
Woodward Building,
15th and H Streets, N.W.,
Washington, D.C., 20444,

and

Mussel Shoals, Alabama, 35660,
AND Also Serve for the above defendant agency:
Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,

and

George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202;

JAMES R. SCHLESINGER, CHAIRMAN,
BOARD OF DIRECTORS,
Atomic Energy Commission,
United States of America,
Washington, D.C., 20545;

ROBERT E. HOLLINGSWORTH,
GENERAL MANAGER,
Atomic Energy Commission,
United States of America,
Washington, D.C., 20545;

B. W. STILLER, MANAGER,
PADUCAH GASEOUS DIFFUSION PLANT,
Atomic Energy Commission,
United States of America,
Paducah, Kentucky, 42001;

UNION CARBIDE CORPORATION,
A New York Corporation,
Serve: C. T. Cororation System,
Kentucky Home Life Building,
Louisville, Kentucky, 40202;

ATOMIC ENERGY COMMISSION,
United States of America,
Washington, D.C., 20545,

and

Paducah Oak Ridge Operations,
Paducah, Kentucky, 42001,
AND Also Serve for the above defendant agency;

Richard G. Kleindienst, Attorney General,
United States of America,
Department of Justice,
Constitution Square,
Ninth and Tenth Streets,
Washington, D.C., 20530,
and
George J. Long,
United States Attorney,
Western District of Kentucky,
United States Courthouse,
Louisville, Kentucky, 40202, ...DEFENDANTS.

JURISDICTION

1. This action arises under the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States of America; U.S.C., Title 28, Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C. Title 28, Section 1361. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2. Plaintiff Commonwealth of Kentucky brings this action by and through Ed W. Hancock, Attorney General for the Commonwealth of Kentucky, pursuant to Kentucky Revised Statutes 224.310, et seq., Kentucky Revised Statutes, Chapter 15, and Section 91 of the Constitution of the Commonwealth of Kentucky.

3. The United States of America has authorized

suit against the defendant agencies, divisions, and officers in their official capacities under U.S.C., Title 16, Section 831c and under the Clean Air Act of 1970, U.S.C., Title 42, Section 1857, et seq.

NATURE OF ACTIONS

4. This action arises out of the refusal of the defendants, Lynn Seeber, General Manager of the Tennessee Valley Authority; Aubrey J. Wagner, Chairman of the Board of Directors of the Tennessee Valley Authority; J. L. McPherson, Superintendent of the Shawnee Power Plant of the Tennessee Valley Authority; T. E. Cavaniss, Superintendent of the Paradise Power Plant of the Tennessee Valley Authority; the Tennessee Valley Authority; Major General W. R. Desbory, Commanding General of the United States Army Armor Center and Fort Knox; Colonel Ernest A. Vuley, Jr., Commanding Officer of the Lexington-Bluegrass Army Depot Major General John Cushman, Commanding General of the 101st. Airborne Division (Airmobile) and Fort Campbell; General Creighton Abrams, Chief of Staff of the United States Army; Robert F. Froehlke, Secretary of the United States Army; Department of the Army; James R. Schlesinger, Chairman of the Board of Directors of the United States Atomic Energy Commission; Robert E. Hollingsworth, General Manager of the United States Atomic Energy Commission; B. W. Stiller, Manager of the Paducah Gaseous Siffusion Plant of the United States Atomic Energy Commission; the United States Atomic Energy Commission; and Union Carbide Corporation, a New

York Corporation, operating the Paducah Gaseous Diffusion Plant of the United States Atomic Energy Commission, to apply for and obtain a permit from the Kentucky Air Pollution Control Commission as required by the Implementation Plan for the Attainment and Maintenance of the National and State Primary and Secondary Ambient Air Quality Standards for the Commonwealth of Kentucky, (hereinafter referred to as the "Kentucky Plan").

5. Section 5 of Kentucky Air Pollution Control Commission Administration Regulation AP-1, was promulgated by the Kentucky Air Pollution Control Commission under the provisions of Kentucky Revised Statutes 224.360 and Kentucky Revised Statutes 224,430, as required by the Commonwealth of Kentucky, (the rules and regulations of the Kentucky Air Pollution Control Commission are contained in Chapter 7 of "Kentucky's Plan"), by U.S.C., Title 42, Section 1857c-5, (hereinafter referred to as Section 110 of the Clean Air Act of 1970), Section 1857f, (hereinafter referred to as Section 118 of the Clean Air Act of 1970), and Section 1857c-8, (hereinafter referred to as Section 113 of the Clean Air Act of 1970). Collectively, Section 110, 118, and 113 of the Clean Air Act of 1970 make the "Kentucky Plan" with the rules and regulations of Chapter 7 in said Plan federal law for the attainment and maintenance of national ambient air quality standards for all federal agencies and facilities located within the Commonwealth of Kentucky.

6. This action arises out of the failure and refusal of defendants, William D. Ruckelshaus, Administrator of the Environmental Protection Agency; Jack E. Ravan, Administrator of Region IV of the Environmental Protection Agency, and the United States Environmental Protection Agency to institute appropriate actions under Section 113 of the Clean Air Act of 1970 against the defendants as set forth in paragraph numbered 4, herein, for compliance with the permit requirements of the "Kentucky Plan." Section 113 of the Clean Air Act of 1970 requires, that when any person is in violation of any applicable implementation plan and upon the failure or inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations of its Plan adopted pursuant to the Clean Air Act of 1970 the Administrator of the United States Environmental Protection Agency is to commence appropriate action toward obtaining compliance with the Plan.

PARTIES

7. Plaintiff, Commonwealth of Kentuky, is a sovereign state of the United States of America and brings this action on its own behalf as parens patriae. The plaintiff, Commonwealth of Kentucky brings this action as representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure. The members of the class, who are so numerous as to make it impracticable to bring them all before this Court, consist of the Commonwealth of Kentucky and all citizens, counties, political subdivisions, and agencies of the Commonwealth of Kentucky. All questions of law and of fact are common to the class; the claim of the plaintiff is typical of the class; and the plaintiff will fairly insure adequate representation of the class. Ed W. Hancock is

presently the duly elected Attorney General for the Commonwealth of Kentucky and as such Attorney General is the chief law officer of the Commonwealth of Kentucky. The authority of the Attorney General to commence this action in the name of the Commonwealth of Kentucky is based upon Section 91 of the Constitution of the Commonwealth of Kentucky, Chapter 15 of Kentucky Revised Statutes, and the common law, which gives him the authority to exercise all common law duties pertaining to the office of the Attorney General.

8. Defendant Tennessee Valley Authority, hereinafter referred to as "TVA", was created by the United States Congress by enactment of the Tennessee Valley Authority Act of 1933, U.S.C., Title 16, Section 831, et seq. Defendant Tennessee Valley Authority has its principal place of business in Mussel Shoals, Alabama.

9. Defendant Aubrey J. Wagner is Chairman of the Board of Directors of Tennessee Valley Authority and is vested with the authority over the operations of Tennessee Valley Authority.

10. Defendant Lynn Seeber is the Manager for Tennessee Valley Authority and is vested with the authority over the operations of Tennessee Valley Authority.

11. Defendant J. L. McPherson is the Superintendent of the Shawnee Power Plant of Tennessee Valley Authority, which facility is located in McCracken County, Kentucky. Defendant J. L. McPherson is vested with the overall responsibility for the day-to-day operations of the Shawnee Power Plant.

12. Defendant T. E. Cavaniss is the Superintendent of the Paradise Power Plant of Tennessee Valley Authority, which facility is located in Muhlenberg County, Kentucky. Defendant T. E. Cavaniss is vested with the overall responsibility for the day-to-day operations of the Paradise Power Plant.

13. Defendant Major General W. R. Desbory is the Commanding General of the United States Army Armor Center and Fort Knox. Defendant W. R. Desbory is vested with the authority over the operations of this United States Army military reservation which lies within Hardin, Meade, Jefferson, Nelson, and Larue Counties, Kentucky.

14. Defendant Colonel Ernest A. Vuley, Jr., is the Commanding Officer of the Lexington-Bluegrass Army Depot. Defendant Ernest A. Vuley, Jr., is vested with the authority over the operations of this United States Army military reservation which lies within Fayette and Madison Counties, Kentucky.

15. Defendant Major General John Cushman is the Commanding General of the 101st. Airborne Division (Airmobile) and Fort Campbell. Defendant John Cushman is vested with the authority over the operations of this United States Army military reservation which lies within Christian County, Kentucky.

16. Defendant General Creighton Abrams who is the Chief of Staff of the United States Army and defendant Robert F. Froehlke who is the Secretary of the United States Army are vested with the athuority over the operations of the United States Army and

more specifically those operations enumerated in paragraphs numbered 13, 14, and 15, herein.

17. Defendant Department of the Army is a duly constituted executive agency of the United States Government and has the direct administrative and operational control over those defendants and military reservations enumerated in paragraphs numbered 13, 14, and 15, herein.

18. Defendant United States Atomic Energy Commission, hereinafter referred to as "AEC", was created by the United States Congress by enactment of the Atomic Energy Act of 1946, Title 42, Section 2031, et seq. Defendant Atomic Energy Commission has its principal place of business in the Commonwealth of Kentucky at the Paducah, Oak Ridge Operations, in Paducah, Kentucky.

19. Defendant James R. Schlesinger is chairman of the Board of Directors of Atomic Energy Commission and as the chief commissioner is vested with the authority for the operations of Atomic Energy Commission.

20. Defendant Robert E. Hollingsworth is General Manager of Atomic Energy Commission and as the administrative officer and executive officer is vested with operational authority for the operations of the various facilities of Atomic Energy Commission.

21. Defendant Union Carbide Corporation, a New York Corporation, registered with the Secretary of State for the Commonwealth of Kentucky to do business and is doing business in the Commonwealth

of Kentucky, along with Atomic Energy Commission, referred to in paragraph numbered 18, herein, operates the Paducah Gas Diffusion Plant of the United States Atomic Energy Commission.

22. Defendant B. W. Stiller is the Manager of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission which is located in McCracken County, Kentucky. Defendant B. W. Stiller is vested with the overall responsibility of the day-to-day operations of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission.

23. Defendant Environmental Protection Agency, hereinafter referred to as "EPA", is a duly constituted agency of the United States of America, and was created pursuant to U.S.C., Title 42, Section 2321.

24. Defendant William D. Ruckelshaus is the Administrator of Environmental Protection Agency and is vested with the authority over the operations of Environmental Protection Agency.

25. Defendant Jack E. Ravan is the Administrator of Region IV of Environmental Protection Agency which includes the Commonwealth of Kentucky, and is vested with the authority over the operations of Environmental Protection Agency in Region IV.

26. In the event that any of the defendants named in paragraphs numbered 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25, herein changes his official capacity so that he is no longer in the office or position described therein, plaintiff will request leave of this Court to amend this Complaint to show the

correct name of that person who succeeds to that office or position.

27. The authority of these defendants herein to carry out their civil functions is limited by laws, rules, and regulations; accordingly, the defendants herein must comply with these laws, rules and regulations with respect to the facilities and equipment in question. The individual defendants herein have been and continue to be responsible for their illegal and unauthorized actions herein alleged. Therefore, relief is sought against the defendants herein to enjoin said defendants from a continuation of their illegal and unauthorized actions in their official capacities and anyone acting in concert therewith:

GENERAL ALLEGATIONS

28. The following equipment emitting air contaminants is known to the plaintiff to be located and currently operating at:

(a) The Shawnee Power Plant of Tennessee Valley Authority:-

(1) Ten 1,347 Million BTU per hour coal-fired boilers.

(b) The Paradise Power Plant of Tennessee Valley Authority:-

(1) Two 6,018 Million BTU per hour coal-fired boilers.

(c) The United States Army Armor Center and Fort Knox:-

(1) Five oil burning indirect heat exchanges in the 0-10 Million BTU per hour input range;

(2) Two hundred seventy three coal-fired indirect heat exchangers in the 0-10,000 Million BTU per hour input range;

(3)Two trash incinerators in the 101-200 pounds per hour capacity range;

(4) Four hundred thirty six coal-fired stoves of less than 50,000 BTU per hour each range;

(5) Stone crushing process operations for road building purposes.

(d) The 101st. Airborne (Airmobile) Division and Fort Campbell:-

(1) One pathological incinerator at post hospital with a rated capacity of approximately 700,000 BTU per hour input range;

(2) Two gas-fired boilers with total burner input of approximately 5,600 Million BTU per hour each;

(3) Two gas-fired boilers with approximately 6,300 Million BTU per hour input each;

(4) Five combination gas and coal-fired indirect heat exchangers with approximately 20 Million BTU per hour input range each;

(5) Three combination gas and oil-fired boilers with approximately 50 Million BTU per hour input range each;

(6) One hand-coal-fired steam boiler with ap-

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proximately 720 Million BTU per hour input range;

(7) Twenty five hand-coal-fired steam boilers with approximately 348 Million per hour input range each;

(8) Three natural gas-fired indirect heat exchangers having approximately 2,800 Million BTU per hour input range each;

(9) Six hand-coal-fired furnaces having 2,712 Million BTU per hour capacity each;

(10) One hand-coal-fired indirect heat exchanger having 576 Million BTU per hour capacity;

(11) Nine natural gas-fired indirect heat exchangers having approximately 6,040 Million BTU per hour capacity input each;

(12) Two natural gas-fired indirect heat exchangers having approximately 4,840 Million BTU per hour capacity each;

(13) Two combination gas-oil-fired indirect heat exchangers having approximately 11,250 Million BTU per hour capacity each.

(e) The Paducah Gaseous Diffusion Plant of the Atomic Energy Commission:-

(1) Three combination gas and fuel oil-fired indirect heat exchangers having a rated capacity of approximately 115 Million BTU per hour capacity each;

(2) Two liquidified petroleum gas incinerators

having rated capacity of approximately 450,000 BTU per hour each;

(3) One paper-burning incinerator with a rated capacity of approximately 10 bushels;

(4) Twenty five different point sources of emissions from the manufacturing process operations. Data as to emission outputs classified as restricted data in accordance with Atomic Energy Act of 1954.

(f) The Lexington-Bluegrass Army Depot:-

(1) Fifteen hand-coal-fired indirect heat exchangers having approximately 50,000 BTU per hour capacity each;

(2) One deactivation furnace for recovery of elemental metal from ammunition of unknown BTU per hour input;

(3) One central heating system of unknown BTU per hour capacity;

(4) Unknown number of gas-fired indirect heat exchangers of unknown BTU per hour capacity.

FIRST CLAIM

29. In furtherance of and to comply with the stated purpose of the Clean Air Act of 1970, U.S.C., Title 42, Section 1857, et seq., "to protect and enhance the quality of the nation's air resources," the plaintiff, Commonwealth of Kentucky, as required by Sections 107 and 110 of the Clean Air Act, and acting by and through its administrative agency, the Kentucky Air

Pollution Control Commission, promulgated and submitted to the defendant Ruckelshaus of EPA an implementation plan. This implementation plan, "Implementation Plan for the Attainment and Maintenance of the National and State Primary and Secondary Ambient Air Quality Standards for the Commonwealth of Kentucky", (hereinafter referred to as the "Kentucky Plan"), specifies the manner in which the state and national primary and secondary ambient air quality standards will be achieved and maintained within the Commonwealth of Kentucky. Attached to this Complaint as if fully set out herein at length is a copy of the Clean Air Act of 1970, as "Exhibit A". [Exhibit A omitted in herein Appendix]

30. Subsection (a) (2) (B) of Section 110 of the Clean Air Act of 1970 requires that the Kentucky Plan include "emission limitations, schedules, and time tables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ." Section 5 of Kentucky Air Pollution Control Commission Administrative Regulation AP-1, which sets out the permit requirement and procedures used to monitor orderly compliance with the Federal and Kentucky Air Laws, was specifically promulgated as part of Chapter 7 of the Kentucky Plan so that the schedules, timetables, and attainment measures of Subsection (a) (2) (B) could be met. Attached to this Complaint and made a part hereof as if copied at length herein is a copy of the Administrative Regulations of

the Kentucky Air Pollution Control Commission, as "Exhibit B". [Exhibit B omitted in herein Appendix]

31. The Kentucky Plan was approved by defendant Ruckelshaus, and the approval was published in the Federal Register, Volume 37, Number 105, pp. 10868 and 10869, and, thereby, the Plan became operative under both Federal and Kentucky law. Kentucky's Plan became Federal law pursuant to Sections 110, 113, and 118 of the Clean Air Act of 1970, and Kentucky law pursuant to Kentucky Revised Statutes 224.310, et seq., and Kentucky Revised Statutes, Chapter 13. Attached to this Complaint as if fully set out herein at length herein is a copy of the Federal Register, Volume 37, Number 105, as "Exhibit C". [Exhibit C omitted in herein Appendix]

32. Section 118 of the Clean Air Act of 1970 requires that "federal facilities" comply with the approved Kentucky Plan and states:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

33. Further, Executive Order No. 11507 promul-

gated by President Nixon on February 4, 1970, provides in Section 4 that:

> "Heads of agencies shall ensure that all facilities under their jurisdiction are designed, operated and maintained so as to meet the following requirement:
>
> (1) Facilities shall conform to air and water quality standards as defined in Section 2(d) of this order. . . ."

Section 2(b) defines agencies as being, *"departments, agencies* and *establishments* of the executive branch." Section 2(d) defines air and water quality standards as their respective quality standards and *"related plans of implementation*. . . adopted pursuant to the Clean Air Act . . . and Federal Water Pollution Control Act. . .". (Emphasis Ours).

34. The above-equipment described in paragraph numbered 28 (a)-(f), and incorporated herein by reference, is air pollutant emitting equipment. Section 5 of Kentucky Air Pollution Control Commission Administrative Regulation, AP-1, which is set forth in Chapter 7 of the Kentucky Plan, as promulgated pursuant to Section 110 and 118 of the Clean Air Act of 1970, requires that the owner and operator of such air pollutant emitting equipment apply for and obtain from the Kentucky Air Pollution Control Commission, a permit to operate their air contaminant equipment. The defendants, Tennessee Valley Authority, Seeber, Wagner, McPherson, Cavaniss, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of

the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, in their official capacities as either officers or agencies of the United States Government, and Union Carbide Corporation have wrongfully and unlawfully refused, and continue to do so, ed to do so by agents, servants, and/or employees of defendant's respective equipment as set forth in paragraph numbered 28 (a)-(f) after having been requested to do so by agents, servants, and/or employees of the Commonwealth of Kentucky. Attached hereto and incorporated herein by reference as "Exhibit D" [Included in herein Appendix] are copies of request letters to the defendants and their refusals.

35. Furthermore, plaintiff has reasonable grounds to believe that at the United States Army Armor Center and Fort Knox, Lexington-Bluegrass Army Depot, and Fort Campbell, there exists other articles, machines, pieces of equipment or other contrivances for which operating permits are required by Chapter 7 of the Kentucky Plan.

36. Additionally, plaintiff, based upon information received, states that equipment now being operated at the Shawnee and Paradise Power Plants of Tennessee Valley Authority, the Paducah Gaseous Diffusion Plan. of Atomic Energy Commission, and the United States Army Military Reservations as set forth in paragraph numbered 28 (a)-(f), and incorporated heren, is in violation of the emission limitations of the Kentucky Plan. Plaintiff has reasonable grounds to believe and states that the Shawnee Power Plant of Tennessee Valley Authority is emitting particulate

matter at a rate of approximately 2.3 times the allowable emission limits, and is emitting sulfur dioxide at a rate of approximately 2.5 tmes the allowable emission limits, based on engineering calculations using best data available to plaintiff:

	Allowable	Actual
Particulate	1481.7 lbs/hr	3396 lbs/hr
Sulfur Dioxide	26940 lbs/hr	68295 lbs/hr

Plaintiff has reasonable grounds to believe and states that the Paradise Power Plant of Tennessee Valley Authority is emitting sulfur dioxide at a rate of approximately 3.85 times the allowable emission limits, based on engineering calculations using best data available to plaintiff:

	Allowable	Actual
Sulfur Dioxide	24072 lbs/hr	92465.6 lbs/hr

37. Plaintiff states that unless the defendants are enjoined and restrained from continuation of their unlawful acts as set forth in paragraph numbered 34, 35, and 36, herein, the defendants will continue to so violate Sections 108 and 110 of the Clean Air Act of 1970. Plaintiff has no other adequate remedy at law and has neither applied for nor been refused on the facts herein stated by any Court of the United States of America a restraining order, temporary injunction, or permanent injunction. The plaintiff and its class of citizens, if the defendants are permitted to continue their unlawful acts, will be permanently denied the right to the use of clean air in the atmosphere, their health and welfare will be endangered, and the

environs of the Commonwealth of Kentucky will be permanently damaged.

SECOND CLAIM

38. Section 110 of the Clean Air Act of 1970 required the Commonwealth of Kentucky to promulgate and adopt an implementation plan to meet and attain the national primary and secondary air quality standards. See paragraph 29 and 30, supra, which are incorporated herein by reference. When the Kentucky Plan was approved by the defendant Ruckelshaus, pursuant to Section 110 of the Clean Air Act, (See paragraph 31, supra, which is incorporated herein by reference), the obligation of its enforcement rested, not only upon the Commonwealth of Kentucky, pursuant to Section 101(3), but also on the Federal Government, through the Administrator, (the defendant Ruckelshaus), of Environmental Protection Agency, pursuant to Section 113 of the Clean Air Act.

39. In particular, Section 113 of the Clean Air Act of 1970 provides that "whenever, on the basis of any information available to him, the Administrator finds that *any person is in violation of any requirement of an applicable implementation plan* . . . or that *violations of an applicable implementation plan are so widespread* that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively. . . ," (Emphasis Ours), the Administrator of Environmental Protection Agency is empowered to commence appropriate actions toward obtaining compliance with the Plan.

40. The unlawful refusals of the defendants Seeber, Wagner, McPherson, Cavaniss, Union Carbide Corporation, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, to apply for and obtain a permit to operate from the Kentucky Air Pollution Control Commission for the equipment they each respectively are operating as set forth in paragraphs 28 (a)-(f) and 34, and incorporated herein by reference; the failure of these defendants to submit appropriate time schedules for compliance; and their violations of the emission limitations for each defendant's equipment, as set forth in paragraphs 28(a)-(f), 35, and 36, and incorporated herein by reference, have resulted not only in "mere" violations, but in "widespread" violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations.

41. Defendants Ruckelshaus, Ravan and Environmental Protection Agency, with information of the violations and widespread violations of the Kentucky Plan and of the inability of the Commonwealth of Kentucky to effectively enforce the Plan, have not commenced any actions toward obtaining compliance by the defendants as set out in paragraph numbered 39 herein with the provisions of the Kentucky Plan as required by Section 113 of the Clean Air Act of 1970.

42. The failure of the defendants Ruckelshaus, Ravan and Environmental Protection Agency to com-

mence appropriate actions against the defendants, Seeber, Wagner, McPherson, Cavaniss, Union Carbide Corporation, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, and Atomic Energy Commission, to compel compliance with the Kentucky Plan as to permits to operate, time schedules, and emission limitations, is so arbitrary, capricious, unlawful, and unwarranted as to deprive the citizens of the plaintiff state, due process and equal protection of the law as granted to the citizens of the Commonwealth of Kentucky, by the Fifth, Ninth, and Fourteenth Amendment to the Constitution of the United States of America.

43. The plaintiff further states that the actions of defendants Ruckelshaus, Ravan and Environmental Protection Agency, as set forth in paragraph numbered 41 and incorporated herein by reference, unless jointly and severally ordered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by defendants set forth in paragraph numbered 40 and incorporated herein by reference, will permanently deprive the plaintiff, its citizens, cities, counties, political subdivisions and agencies of the Commonwealth of Kentucky, of their right to the use of clean air in the atmosphere of the Commonwealth of Kentucky, and permanently damage the environs of the Commonwealth of Kentucky, and will allow conditions to be created which are dangerous to the health and welfare of the citizens of the Commonwealth of Kentucky.

44. Plaintiff states that the failure of defendants Environmental Protection Agency, Ruckelshaus, and Ravan to commence actions for compliance against the defendants set forth in paragraph numbered 40 and incorporated herein by reference is manifestly exemplified by the October 17, 1972, directive of defendant Ravan, which recommended that Federal facilities in Region IV should not apply for permits from any state. Attached as "Exhibit E" [Included in herein Appendix] and incorporated herein by reference as if fully copied herein is the Ravan letter of October 17, 1972.

THIRD CLAIM

45. Plaintiff states that defendants Seeber, Wagner, McPherson. Cavaniss, Tennessee Valley Authority, Desbory, Vuley. Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation on divers occasions have been requested by agents, servants, and/or employees of the Commonwealth of Kentucky to submit an application for and to obtain a permit to operate an air contaminant source and failed to submit the compliance schedules for attainment if the emission limitations as required by Chapter 7 of the Kentucky Plan adopted pursuant to the Clean Air Act of 1970.

46. Plaintiff states that the defendants as set forth in paragraphs numbered 34 and 45 and incorporated herein by reference have refused to submit applications for a permit to operate an air contaminant source on the basis of the policies of their respective agencies that Federal agencies do not have to comply with the permit requirements of a state plan as well as those of Kentucky's Plan, which is now applicable Federal law. Plaintiff states that there is existing a dispute between plaintiff and these dedendants as to the defendants' complying with the permit requirements of the Kentucky Plan and this Court should determine rights and obligations of the parties hereto.

47. Plaintiff states that defendants Environmental Protection Agency, Ruckelshaus and Ravan have failed to commence appropriate action against the defendants set forth in paragraphs numbered 39, 40, 41, 42, and 45, and incorporated herein by reference, toward obtaining compliance with the Kentucky Plan as required by Section 113 of the Clean Air Act of 1970. This Court should determine whether these defendants should assist the plaintiff in obtaining compliance with the permit system as set forth in Chapter 7 of Kentucky's Plan, which has been made Federal law. Plaintiff requests the review of this agency action or lack thereof, and that this action is being unlawfully withheld and/or unreasonably delayed, pursuant to U.S.C., Title 5, Section 702, et seq.

FOURTH CLAIM

48. Plaintiff states that the policy of Tennessee Valley Authority, Atomic Energy Commission, Environmental Protection Agency, and the Department of the Army, as set forth in paragraph numbered 3 through 47 and incorporated herein by reference that

Federal agencies do not have to comply with the permit requirements of Kentucky's Plan promulgated pursuant to U.S.C., Title 42, Section 1857, et seq., is arbitrary, capricious, abuse of discretion, not in accordance with law, and contrary to the constitutional rights of plaintiff and to its citizens. Therefore, this policy should be declared unlawful and set aside.

FIFTH CLAIM

49. Plaintiff states that Section 5 of the Administrative Regulation AP-1 of Kentucky Air Pollution Control Commission promulgated pursuant to Kentucky Revised Statutes 224.360 and Kentucky Revised Statutes 224.430 requires that any person who uses, operates or maintains an air contaminant source resulting in the presence of air contaminants in the atmosphere of the Commonwealth of Kentucky must first obtain a permit to operate. A copy of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission being heretofore incorparated in this Complaint as plaintiff's "Exhibit B". [Exhibit B omitted in herein Appendix]

50. Plaintiff states that the defendants, Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation, use, operate and maintain air contaminant equipment in the Commonwealth of Kentucky, that Section 5 of Administrative Regulation AP-5 of the Kentucky Air Pollution Control Commission

requires the users, operators, maintainers of such equipment to obtain a permit to operate. These defendants each operate their respective equipment as set forth in paragraphs 28(a)-(f) and 29 incorporated herein by reference and refuse to obtain a permit to operate after having been requested to do so by agents, servants, and/or employees of the Commonwealth of Kentucky. These defendants have so refused to apply for a permit in either official capacity or agency of the United States Government, and Union Carbide Corporation as the contractor-operator of the Paducah Gaseous Diffusion Plant of the Atomic Energy Commission. See paragraph numbered 34 which is incorporated herein the same as if fully set forth herein.

51. Section 101 (a) (3) of the Clean Air Act of 1970 provides that the prevention and control of air pollution at its source is the primary responsibility of states and local governments. Section 118 of the Clean Air Act of 1970 provides that "each" department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. Section 116 of the Clean Air Act of 1970 provides that except in the area of state regulations on moving sources, (motor vehicles), "nothing in this act shall preclude or deny the right of any state or political subdivision thereof to adopt

or enforce . . . (2) any requirement respecting control or abatement of air pollution".

52. Plaintiff states that the permit requirement under Kentucky laws, Kentucky Revised Statutes 224.-360. Kentucky Revised Statutes 224.430, and Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission, is the major portion of the abatement and control program for air pollution by the Commonwealth of Kentucky. When a person submits an application to operate an air contaminant source they must set forth the specific nature of their operations, the types of air pollutants emitted, the point source for each of the emissions and the control equipment presently installed or to be installed. The engineering staff of the Kentucky Air Pollution Control Commission by reviewing these plans and specifications are able to calculate and determine whether or not that particular air contaminant source is complying with the air quality standards. This review can prevent the operation of the equipment which allows air contaminants to be emitted in excess of that allowed by applicable regulation, as well as provides for the making of the necessary changes by the air contaminant sources so that the air quality standards will not be violated.

53. Plaintiff states that as a result of the United States Congress enacting Section 101, Section 116, and Section 118 of the Clean Air Act of 1970, there was an affirmative waiver of the sovereign immunity of the United States of America and, therefore, provided that Federal agencies and their officials must

comply with the state abatement and control programs, and provides that the states bring the necessary litigation for compliance. This Court should issue an order directing the defendants Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation comply with the permit requirements of Kentucky's abatement and control program.

WHEREFORE, plaintiff prays as follows:

1. On plaintiff's First Claim, (paragraphs numbered 29 through 37 herein), that the defendants, Seeber, Wagner, McPherson, Cavaniss, Tennessee Valley Authority, Desbory, Vuley, Cushman, Abrams, Froehlke, Department of the Army, Schlesinger, Hollingsworth, Stiller, Atomic Energy Commission, and Union Carbide Corporation be jointly and severally:—

(A). Ordered to apply for and to obtain permits from the Kentucky Air Pollution Control Commission, pursuant to Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission as promulgated in Chapter 7 of the Kentucky Plan pursuant to Section 107 and Section 110 of the Clean Air Act of 1970;

(B). Permanently restrained from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970.

2. On plaintiff's Second Claim, (paragraphs

numbered 38 through 44 herein), that the defendants Ravan, Ruckelshaus and the Environmental Protection Agency be jointly and severally: —

(A). Ordered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants set forth in paragraph numbered 1 of this prayer with the Kentucky Plan, specifically Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission, which is contained in Chapter 7 of the Kentucky Plan.

3. On plaintiff's Third Claim, (paragraphs numbered 45 through 47 herein), have a judgment and decree of this Court declaring plaintiff's rights and status, and more particularly adjudicating: —

(A). That the defendants set forth in paragraph numbered 1 of this prayer, jointly and severally, do not have the right, authority, or power to refuse to comply with the permit requirements of the Kentucky Plan;

(B). That the defendants Ravan, Ruckelshaus, and the Environmental Protection Agency do not have the right, authority, or power when there are knowingly widespread violations of the Kentucky Plan to fail to initiate appropriate action pursuant to Section 113 of the Clean Air Act of 1970.

4. On plaintiff's Fourth Claim, (paragraph numbered 48 herein): —

(A). That the policy of Tennessee Valley Au-

thority, Atomic Energy Commission, and the Department of the Army stating that Federal agencies and facilities in Kentucky do not have to fully comply with the Kentucky Plan be held unlawful and set aside.

5. On plaintiff's Fifth Claim, (paragraphs numbered 49 through 53 herein), that the defendants set forth in paragraph numbered 1 of this prayer be jointly and severally: —

(A). Ordered to apply for and obtain permits from the Kentucky Air Pollution Control Commission, as required by Kentucky Revised Statutes 224.-360, Kentucky Revised Statutes 224.430, and Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission.

(B). Permanently restrained from refusing to comply with the abatement and control program of the Kentucky Air Pollution Control Commission, an administrative agency of the Commonwealth of Kentucky, as required by the Clean Air Act of 1970.

6. That defendants pay the costs herein expended and

7. For any and all other proper orders and relief to which plaintiff may be entitled.

Respectfully Submitted,

/s/ Ed W. Hancock
ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY
Capitol Building
Frankfort, Kentucky 40601
(Telephone: (502) 564-4513)

/s/ Kenneth A. Howe Jr.
KENNETH A. HOWE JR.
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY

/s/ Paul A. Lynch
PAUL A. LYNCH,
ASSISTANT ATTORNEY
GENERAL
COMMONWEALTH OF
KENTUCKY
309 Shelby Street, Room 111
Frankfort, Kentucky 40601
(Telephone: (502) 564-3595)
COUNSEL FOR PLAINTIFF
COMMONWEALTH OF
KENTUCKY

* * *

[Exhibit A Omitted in Printing]

* * *

[Exhibit B Omitted in Printing]

* * *

[Exhibit C Omitted in Printing]

"EXHIBIT D"

Request Letters To Defendants.

UNION CARBIDE CORPORATION
P.O. Box Y
Oak Ridge, Tennessee 37830

Law Department
Oak Ridge Office

July 29, 1971

Mr. John W. Sullivan, Chief
Engineering Section
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Re: Permit Application for Air Contaminant Source Paducah Gaseous Diffusion Plant

Dear Mr. Sullivan:

Your letter of July 2, 1971, directed to Union Carbide offices in Paducah, Kentucky, has been forwarded to us for reply. The letter noted that you had not then received the captioned permit application, requested

in your previous letter of June 15, and forwarded an additional set of application forms.

As I advised you in our telephone conversation some time ago, all facilities at the Paducah Gaseous Diffusions Plant are owned by the United States Government, acting by and through the Atomic Energy Commission, and operated by Union Carbide acting under its prime contract with the AEC. Any action such as the application for a permit from a state regulatory agency must, therefore, be taken by the AEC, under the requirements of Federal statutes and regulations as well as the contractual provisions under which Union Carbide operates these facilities.

Your original and subsequent communications were promptly delivered by us to the proper AEC officials at Paducah, and we would suggest that your future communications regarding this and related matters should be directed to such officials. The cognizant AEC official is: Mr. B. N. Stiller, Area Manager, Paducah Office, Oak Ridge Operations, U. S. Atomic Energy Commission, P. O. Box 1150, Paducah, Kentucky 42001.

We trust the foregoing information will simplify your handling of matters relative to the Paducah Gaseous Diffusion Plant. If we can be of further service, please advise.

Sincerely,

/s/ Edgar R. Bowers
Edgar R. Bowers

ERB:awh

UNITED STATES
ATOMIC ENERGY COMMISSION

IN Reply Refer To:
M:EWN

Paducah, Kentucky 42001
July 23, 1971

Kentucky Air Pollution Control Commission
ATTN: Mr. J. W. Sullivan
275 East Main Street
Frankfort, Kentucky 40601

Subject: AIR POLLUTION CONTROL COMMISSION — INVENTORY

Gentlemen:

Your Permit Application, Form APC-110, forwarded to our operating contractor, Union Carbide Corporation, Nuclear Division, relative to the Government-owned gaseous diffusion plant near Paducah, Kentucky, was referred to this office for reply.

While we do not consider the Kentucky requirements to be directly applicable to the operation of the Federally-owned facility for atomic energy purposes, we share with the State a deep interest in preventing and abating both air and water pollution problems and are happy to cooperate as a matter of comity with the Kentucky Air Pollution Control Commission. We there-

fore directed our operating contractor to complete the form providing the information sought, and we are submitting this information to you. With this transmittal, we are demonstrating our willingness to cooperate with the State within the framework of Executive Order No. 11507 which provides the policy of the Federal Government to work with State and local bodies in matters of air and water pollution control.

If you have any questions regarding the data submitted, please advise. My telephone number is Area Code 502,444-6311, extension 227, or FTS 502-444-6227.

Sincerely,

/s/ B. N. Stiller
Manager
Paducah Area

Enclosure:
Form APC-100w/atts.

June 29, 1972

Mr. Robert L. Eaton
Administrative Assistant
A G Office
Headquarters US Army Armor Center and
Fort Knox
Fort Knox, Kentucky 40121

Dear Mr. Eaton:

Regarding the Army's air pollution control program at Fort Knox referred to in your letter of June 9, 1972, we would like to know about the air contaminant sources and the degree that they will be controlled. The anticipated schedule for completion of the various abatement projects you mentioned is also desired.

The reason for requesting this information is that the Federal Government requires that the Kentucky Air Pollution Control Commission achieve control of emissions from air contaminant sources in the State within a specific time schedule.

If you have any questions or wish an informal meeting to discuss this matter, please contact me.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY ARMOR CENTER
AND FORT KNOX
FORT KNOX, KENTUCKY 40121

AHBADFAE 9 JUN 1972

Mr. Samuel M. Murphy, Engineering Program
Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Murphy:

Reference is made to your letter of May 26, 1972, concerning pollution control permits for any contaminating facilities located at Fort Knox.

Department of the Army policies prohibit installation commanders from making application for State or local permits relating to air emissions, waste water discharges or the construction and operation of facilities involving pollution. However, the Army does have a comprehensive pollution control program and all pollution abatement projects possible within funding and approved limitations are being accomplished at this installation.

Sincerely yours,
/s/ Robert L. Eaton
ROBERT L. EATON
Administrative Asst
AG Office

May 26, 1972
Commanding General, U.S.A.A.R.M.C.
Fort Knox, Kentucky 40121

Dear Sir:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution From Federal Facilities." The first sentence of this section states—

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."
>
> (U.S. Government Printing Office: 1971 0-413-241, P. 27)

To inform you of the requirements in Kentucky, I enclose a copy of KAPCC Regulations AP-1 through AP-10 and a set of permit applications forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit

to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

Commanding General, U.S.A.A.R.M.C.
Page Two
May 26, 1972

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Among the sources that should be included in the permit application are incinerators, indirect heat exchangers and any process operations such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit an application with all pertinent data on or before August 26, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce
Enclosure

DEPARTMENT OF THE ARMY
HEADQUARTERS, LEXINGTON-BLUE GRASS
ARMY DEPOT
LEXINGTON, KENTUCKY 40507

25 JUL 1972

AMXLX-S

Mr. Samuel M. Murphy
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Murphy:

The following information is forwarded in response to your letter of 1 June 1972 requesting the depot to apply for a permit in compliance with KAPCC Regulations AP-1 through AP-10.

Staff and operating personnel at all levels of the depot have taken aggressive action to improve the environment and to control or eliminate problem areas that could be detrimental to the ecology. In June 1969, a depot-wide survey encompassing all operations was conducted to identify potential pollution problem areas. The areas are under continual surveillance to insure that approved procedures are followed.

The depot has invested considerable operating capital in modernizing operations, in procuring and installing new equipment, and in modifying and constructing new

facilities to combat actual and incipient pollution hazards. Some examples are: within the spirit of the Clean Air Act of December 1970 several coal burning facilities were converted to fuel oil operations; several quarters have had new natural gas heating systems installed; open-pit burning was discontinued as of October 1970, in coordination with state officials; refuse disposal is accomplished by operation of sanitary landfills. Further, a project to install air pollution control cyclone collectors in the central heating plant has been approved by higher headquarters and as funds are provided should be installed in the foreseeable future.

25 JUL 1972

Mr. Samuel M. Murphy
Kentucky Air Pollution Control Commission

Department of the Army policy prohibits installation commanders from applying for permits from state or local pollution regulatory authorities. Consequently, this depot must decline your request to submit the permit application forms. Although we are not allowed to submit these forms, please understand that this depot will cooperate in every possible way to control and to eliminate pollution hazards. In this regard, representatives from state and local environmental pollution control agencies may visit our facilities, may examine operating records and may conduct tests provided security restrictions are met and the visitors are accompanied by applicable representatives designated

by Headquarters, US Army Materiel Command, Washington, DC.

Sincerely yours,

/s/ E. S. Goepper
E. S. GOEPPER
COL, QMC
Commanding Officer

Copy furnished:
AMCIS-MD, Washington, DC

June 1, 1972

Col Edwin S. Goepper
Commanding Officer
Lexington Blue Grass Depot
Lexington, Kentucky 40507
Dear Col Goepper:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution from Federal Facilities" The first sentence of this section states —

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to

the same extent that any person is subject to such requirements."

(U.S. Government Printing Office: 1971 0.413 241, P. 27)

To inform you of the requirements in Kentucky, I am enclosing a copy of KAPCC Regulations AP-1 through AP-10 and a set of permit application forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Col. Edwin S. Goepper
Page Two
June 1, 1972

Among the sources that should be included in the permit application are incinerators, indirect heat exchangers and any process operations, such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit

an application with all pertinent data on or before August 31, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM.ce
Enclosures

DEPARTMENT OF THE ARMY
HEADQUARTERS 101ST AIRBORNE DIVISION (AIRMOBILE) AND FORT CAMPBELL
FORT CAMPBELL, KENTUCKY 42223

AJCEN

15 August 1972
AUG 17 Rec'd

Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Attention: Mr. Samuel M. Murphy

Gentlemen:

Reference is made to your letter dated 1 June 1972 concerning the submittal of an application for a permit for operation of heating plants.

Although current Department of the Army regulations do not allow us to apply for such a permit we do wish to cooperate in every way possible with your office. Accordingly, enclosed is pertinent information on our heating plants which appear to be covered by your regulations. Please advise if any further information is desired.

Sincerely yours,

/s/ Robert Anderson
ROBERT ANDERSON
Acting Facilities Engineer

1 Incl

June 1, 1972

Commanding Officer, U.S. Army
Defense Military Function
Fort Campbell, Kentucky 42223

Dear Sir:

I wish to call to your attention the Clean Air Act, December 1970, Section 118, "Control of Pollution from Federal Facilities." The first sentence of this section states—

> "Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in

> the discharge of air poilutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."
>
> (U.S. Government Printing Office: 1971 0-413-241, P. 27)

To inform you of the requirements in Kentucky, I am enclosing a copy of KAPCC Regulations AP-1 through AP 10 and a set of permit application forms with instructions.

You will note in AP-1, Section 5 that it is a requirement of the Kentucky Air Pollution Control Commission that any one who constructs or operates an air contaminant source in the State must have a permit. The Commission's policy is to issue one permit to cover all source emissions of a facility. Therefore all emission sources should be indicated on the application and include a description of the controls currently in use or proposed to achieve compliance with the regulations.

In order that a permit be issued it is necessary to include a time schedule showing when compliance will be accomplished for those sources not yet controlled.

Among the sources that should be included in the permit application are incinerators, indirect heat ex-

changers and any process operations, such as stone crushing and hot mix asphalt plants.

In view of the above you are requested to submit an application with all pertinent data on or before August 31, 1972.

If you have any questions, feel free to contact this office.

Sincerely,

/s/ Samuel M. Murphy
Engineering Program

SMM:ce
Enclosures

KENTUCKY
AIR POLLUTION CONTROL COMMISSION
275 EAST MAIN STREET
FRANKFORT, KENTUCKY 40601

F. E. Gartrell, Dr. P. H.
Research and Development
Tennessee Valley Authority
Chattanooga, Tennessee 37401

Dear Dr. Gartrell:

This is to acknowledge your letter of August 14, 1972, concerning TVA's policy regarding the securing of state air pollution control permits and compliance with applicable sulfur dioxide emission standards.

It is regrettable that TVA at this late date maintains an official policy of ignoring state legal environmental requirements in light of what is, in our view,

explicit language in the Clean Air Act (As Amended) and Executive Order 11507 issued by President Nixon on February 4, 1970. We are aware that Alabama's recent action to force TVA is comply with similar requirements in that state, and discussions are presently being held with our Attorney General's Office to determine whether or not Kentucky may follow a similar course.

Regarding your request for an extension of the regulatory deadline for submittal of an acceptable sulfur dioxide control strategy, on or before January 1, 1973, we will be in a better position to answer your request following a review of your proposed strategy as to its adequacy and enforceability. The Commission meets next on October 17, 1972, if possible, we will attempt to make this an Agenda item and reach a definite position at that time.

The question of liability for proper coal refuse disposal in compliance with Commission regulations, appears to be as you state with the Peabody Coal Company. However, this question is being referred to our attorneys for further review. If any diversion with your position is identified, that will be brought to your attention.

Sincerely yours,

/s/ Frank P. Partee
Frank P. Partee, Director
Kentucky Air Pollution Control
Commission

FPP:as
Enclosure

TENNESSEE VALLEY AUTHORITY
CHATTANOOGA, TENNESSEE 37401
August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort,Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible

alternative control measures which we might apply at those TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire.

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to

demonstrate that our strategy will achieve and maintain the applicable ambient air quality standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being mined. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either in written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/F. E. Gartrell
F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Enclosures

"EXHIBIT E"

October 17, 1973, Directive from Jack E. Ravan, Administrator, Region IV, Environmental Protection Agency.

ROUTING AND TRANSMITTAL SLIP

1 TO (Name, office symbol or location)
MR. FRANK P. PARTEE

REMARKS

The attached letter has been set to Command Levels and Key Environmental Officials with the various Federal installations and agencies within this Region.

If you have any questions, please contact Mr. A. G. Linton as indicated in the letter.

/s/ Gene B. Welsh
Gene B. Welsh
Director

Air and Water Programs
Division

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions.

FROM (Name, office symbol or location)
EPA, Region IV, Atlanta, Georgia

DATE
10/30/72

PHONE
404-526-3043
OPTIONAL FORM 41 *GPO: 1972 O - 460-910

August 1967
GSA FPMR (41CFR) 100 - 11 206

ENVIRONMENTAL PROTECTION AGENCY
REGION IV
1421 Peachtree St., N.E., Atlanta, Georgia 30309

October 17, 1972

SUBJECT: Federal Agencies Compliance with Section 118 of Clean Air Act and Executive Order 11507

Dear Sir:

With reference to Section 118 of Clean Air Act, as amended, Section 21 of the Federal Water Pollution Control Act, as amended, and Executive Order 11507, Federal facilities have a responsibility to cooperate with EPA and state pollution control efforts and programs. The purpose of this letter is to advise you of these responsibilities and to recommend a course of action that will facilitate mutual Federal/State agreement on air and water pollution control compliance measures.

It is clear that Section 118 of the Clean Air Act requires Federal facilities to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans. As you are aware, there has been considerable discussion regarding appropriate procedural mechanisms for obtaining Federal agency commitments to install air pollution abatement equipment and to make progress reports demonstrating adherence to pertinent standards, emission limitations and compliance schedules. These discussions have also addressed the extent to which Section 118 requires Federal agencies to comply with state and local procedural requirements for reports, permits, registration, inspection and data.

Our advice on this matter, at this time, is to provide the data specifically requested by the states so they may make a determination as to: (1) the facilities compliance with the approved state air implementation plans and (2) the abatement action facilities must take in order to meet implementation plan requirements.

We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compliance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and

the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records. Whenever a state makes a reasonable and specific request to review operating records, we recommend that your agency adopt an open-door policy by providing the requested data. We do not, however, encourage the submission of continuous reporting of routine operating data except on an "as needed" basis.

If a state uses a registration procedure to obtain discharge information, Federal facilities should file registration forms. However, we do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issurance of a state permit or license. The registration and other needed data should voluntarily be provided to the states by your agency. Our aim is to encourage Federal agencies to provide the states with all the information required to assess compliance of pollution sources with standards, emission and discharge limitations and the needs for additional abatement measures.

With respect to reporting of waste water treatment operations, we would like to make the same distinction as described above in regard to data needed to determine if the facility is required to install additional abatement equipment or take other abatement measures as compared to routine operating data. If a state

or EPA has reasons to believe that a waste water treatment facility is not adequate to meet water quality standards or is not being operated effectively, a specific request for information will be made. The facility should then provide, for a designated period of time, operating or monitoring data needed to complete that particular study and develop recommendations for additional remedial action.

We hope this advice and guidance will be beneficial to Federal facilities and aid them to respond to the immediate requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. If you should have any comments or questions regarding this subject matter, please contact Mr. Arthur G. Linton, Chief, Federal Activities Office, (telephone number 404-526-5253).

Sincerely yours,

/s/ Jack E. Ravan
Jack E. Ravan
Regional Administrator

Filed Jan. 18, 1973

[Title Omitted in Printing]

MOTION

1. Pursuant to the laws of the Commonwealth of Virginia, the Virginia Air Pollution Control Board, an agency of the Commonwealth, is charged with the duty of abating, controlling and prohibiting air pollution throughout the Commonwealth. In the execution of its duty, the Virginia Air Pollution Control Board has promulgated rules and regulations which, unlike those of the Commonwealth of Kentucky, require the issuance of a permit only for new sources of air pollutants, including modifications of existing sources.

2. Existing sources of emission of air pollutants of a certain magnitude were to be registered with the Virginia Air Pollution Control Board and thereafter, plans for the control of emissions in excess of allowable limitations were to be submitted to the Board for each such existing source.

3. At present, there are within the Commonwealth of Virginia numerous sources of air pollutants owned and operated by, or for the benefit of, the United States including, but not limited to, facilities of the Department of the Navy, the Department of the Army, the Department of the Air Force and the General Services Administration.

4. At this time, the United States is not believed to be engaged in any activity in the Commonwealth which would require the prior issuance of a permit by

the Virginia Air Pollution Control Board; however, the Commonwealth asserts a vital interest in the issues presented by this action and its participation herein as amicus curiae may be of assistance to the Court. Therefore, the Commonwealth moves the Court for leave to appear as amicus curiae and to make such arguments and tender such briefs as are appropriate.

COMMONWEALTH OF VIRGINIA

By /s/ Andrew P. Miller
Attorney General

/s/ C. Tabor Cronk
Assistant Attorney General

Andrew P. Miller
Attorney General

C. Tabor Cronk
Assistant Attorney General
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219

[Certificate of Service Omitted in Printing]

Rendered — 2-5-73
Entered: 2-5-73

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

COMMONWEALTH OF KENTUCKY, Ex Rel.
Ed W. Hancock, Attorney General
of Kentucky
v.

Plaintiff,
CIVIL ACTION
NO. 7480-G

WILLIAM D. RUCKELSHAUS,
Administrator of the
Environmental Protection
Agency, et al.,

Defenants.

ORDER

Citing its interest in the issues before the Court in this case, the Commonwealth of Virginia has, by its Attorney General, moved the Court to exercise its discretion to permit the Commonwealth to appear herein as amicus curiae.

In consideration of the Commonwealth's motion, and deeming it proper to do so, it is hereby ordered that the Commonwealth be, and hereby is permitted to appear as amicus curiae and to make such arguments and tender such briefs as are appropriate.

Enter this Order this
5th day of February, 1973.

/s/ James F. Gordon
JUDGE

/s/ Barbara D. Spain

Filed March 5. 1973

[Title Omitted in Printing]

**MOTION TO DISMISS OR
IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT**

Defendants Tennessee Valley Authority, Aubrey J. Wagner, Lynn Seeber, J. L. McPherson, and T. E. Cavaniss move the Court to dismiss the action as to them on the grounds that (1) the complaint fails to state a claim against said defendants upon which relief can be granted, (2) the action cannot be maintained by the State Attorney General without the request and consent of the Kentucky Air Pollution Control Commission, and (3) the action cannot be maintained as a class action.

In the alternative, said defendants move for summary judgment in their favor on the ground that the pleadings, together with the affidavit of Lynn Seeber, hereto annexed as Exhibit 1, show that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

Said defendants request that this motion be set for oral hearing at a time convenient to the Court.

Respectfully submitted,

/s/ Robert H. Marquis
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee

/s/ Herbert S. Sanger, Jr.
Associate General Counsel
Beauchamp E. Brogan
Assistant General Counsel

/s/ Justin M. Schwamm
Attorneys for Defendants Tennessee Valley Authority, Aubrey J. Wagner, Lynn Seeber, J. L. McPherson, and J. T. Cavaniss

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

EXHIBIT 1

AFFIDAVIT OF LYNN SEEBER

STATE OF TENNESSEE }
} SS
COUNTY OF KNOX }

Lynn Seeber, being first duly sworn, deposes and says:

I am the General Manager of the Tennessee Valley Authority (TVA) and I have occupied that position since March 1, 1970. I was graduated from the University of Tennessee with a B.S. degree in industrial management in 1949, and a J.D. degree in 1951. While in Law School at the University, I was Editor-in-Chief of the Tennessee Law Review and a member of the Order of the Coif. I am licensed to

practice law in the State of Tennessee. I was employed by TVA as an attorney in the Division of Law from 1952 until 1967, when I was appointed Director of the Division of Reservoir Properties. Later in 1967 I returned to the Division of Law as Solicitor. In 1969 I was appointed Assistant General Manager and served in that capacity until March 1, 1970, when I was appointed General Manager.

As General Manager I am the principal TVA administrative officer and I have responsibility for the coordination and execution of programs, policies and decisions adopted or approved by the TVA Board of Directors. I review proposed TVA actions having major policy implications. I have personal knowledge of the matters herein set forth.

In August and October 1972, TVA transmitted to the State of Kentucky information concerning its Paradise and Shawnee Steam Plants in Kentucky, the emissions therefrom, and plans and schedules for reducing and controlling such emissions. The information was supplied on the permit forms provided by the State, but in the letters transmitting the forms it was made clear that TVA did not consider itself bound to secure permits, and that TVA was not thereby applying for the issuance of permits. Copies of the letters of transmittal are attached hereto as Exhibits A and B.

By letter dated November 10, 1972, the Commission wrote me acknowledging the fact that it had received the required emission data and other related

information concerning TVA's Paradise and Shawnee Plants. This letter requested a formal statement of TVA's position on the permit question by December 8, 1972, for consideration by the Commission at its December meeting of what further steps it might desire to take. A copy of this letter is attached hereto as Exhibit C.

On November 29, 1972, after this action was filed, the Commission wrote me again stating that the Attorney General had filed the action, and that such filing was independent of the Commission. The Commission expressed regret for such action having been taken before I had a chance to reply to its November 10, 1972, inquiry. A copy of the November 29 letter is attached hereto as Exhibit D.

Further information on TVA's emission control plans and schedules was submitted to the State on January 19, 1973. A copy of the transmittal letter is attached as Exhibit E.

TVA received a letter dated October 17, 1972, from the Environmental Protection Agency (EPA), the text of which is identical to the one which the Kentucky Air Pollution Control Commission received from EPA and which is attached as Exhibit E to plaintiff's complaint. A copy of the letter referred to is attached hereto as Exhibit F. This letter sets forth EPA's interpretation of certain requirements of section 118 of the Clean Air Act and Executive Order 11507, including their application to state permit requirements, as they affect federal agencies. Thereafter TVA re-

ceived a memorandum dated January 26, 1973, from William D. Ruckelshaus, Administrator of EPA, in which he affirmed the view taken in the October 17, 1972, letter, stating, in pertinent part:

> It is EPA's view, expressed last year, that Federal facilities are not required to apply for State operating permits.

A copy of the January 26, 1973, memorandum in hereto attached as Exhibit G. The procedure outlined by EPA in Exhibits F and G, with the exception of signing the permit forms as recommended in Exhibit G, has been followed by TVA in its dealings with the State of Kentucky concerning TVA's obligations under section 118 of the Clean Air Act. The Commission has not at any time informed TVA that the information submitted by TVA is unsatisfactory or in any way insufficient to permit the Commission to assess TVA's emissions or its control strategies and compliance schedules. The State of Kentucky has never informed TVA that it desires verification of the data submitted to it by TVA. TVA will supply such verification if the State of Kentucky deems it necessary.

/s/ Lynn Seeber
Lynn Seeber

[Jurat Omitted in Printing]

Exhibit A

August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible alternative control measures which we might apply at

those TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire.

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to

demonstrate that our strategy will achieve and maintain the applicable ambient air quality standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being used. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P.H.
Director of Environmental
Research and Development

Enclosures

Exhibit B

October 13, 1972

Mr. Frank P. Partee, Technical Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

As provided for in AP-1, section 11(2), Kentucky Air Pollution Control Commission Regulations, we are sending you TVA's control plan and schedule for achieving compliance with particulate emission standards at TVA's Paradise and Shawnee Steam Plants.

In reference to your letter of August 31, 1972, we also regret that TVA and the Air Pollution Control Commission do not agree on whether TVA, as a federal agency, is obligated to obtain state permits. However, we sincerely hope that the disagreement of our two agencies on this legal issue will not stand in the way of our continued cooperation to achieve the air quality goals of the Commonwealth of Kentucky. For its part, TVA will continue to comply with the standards of Kentucky's Air Pollution Control Commission Regulations and to provide the Commission with all appropriate information. In regard to the permit question, you may be interested in examining a copy of the papers filed in the case of *People* v. *Stastny*, Civ. No. 72-112-WPC (C.D. Cal., July 17, 1972), being sent to you under separate cover.

If you have any questions concerning the control plan and schedule, please let me know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Exhibit C

KENTUCKY
AIR POLLUTION CONTROL COMMISSION
275 East Main Street
FRANKFORT, KENTUCKY 40601
November 10, 1972

Mr. Lynn Seeber
General Manager
Tennessee Valley Authority
411 New Sprankle Building
Knoxville, Tennessee 37902

Dear Mr. Seeber:

On July 13, 1972, the Commission forwarded to Dr. Larry Montgomery, Air Quality Branch, TVA, Mussel Shoals, Alabama a standard form for a permit to operate an air contaminant source in Kentucky. (Shawnee Power Plant, Paradise Power Plant). On August 14, 1972, a response was received which gave the required emission data and other related information, but contained remarks stating TVA "is not required to secure

state permits" and is "not thereby applying for the issuance of permits."

Accordingly, at its October 17, 1972, meeting the Commission moved to do two things: (1) to appeal to your office as the highest identifiable federal authority directly responsible for the named facility's operation and solicit your cooperation, and (2) to request advice from Mr. William E. Ruckelshaus, Administrator, U.S. Environmental Protection as to his agency's intent on achieving compliance by federal facilities with applicable state air pollution regulations.

You are probably aware that Section 110 of the Clean Air Act (42 U.S.C. 1857 et seq) requires all states to develop an implementation plan to attain and maintain national goals for air quality. The plans are anchored in the premise of eliminating air pollution at its source through the imposition of discharge limits. Definite timeframes were imposed by Congress in the Act to complete source control programs. In Kentucky, the legal mechanism for accomplishing these actions is through the issuance of permits to construct and to operate air pollution sources, which permits embody the time schedule required to bring each sourc into compliance. Section 118 of the Clean Air Act states clearly that:

Mr. Lynn Seeber
Page Two
November 10, 1972

> "Each department, agency, and instrumentality of the executive, legislative and judicial branches of

> the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

Some questions seem to arise as to what was intended by the word "requirements." We maintain it relates not only to the substantive discharge limits, but to ordinary administrative requirements as well, including the application for and obtaining of a state permit to operate your facility

The Alabama Air Pollution Control Commission recently filed a complaint in the U.S. District Court, Alabama Northern District, to force compliance by federal facilities in that state with their permit requirements. The outcome of that action will undoubtedly clarify what federal facilities must do to comply with all State Implementation Plans. Before our Commission would join in such precipitious action, we would hope that all agencies such as yours would cooperate in a spirit of federal leadership as directed by President Nixon in his Executive Order No. 11507, issued February 4, 1970.

You might be interested to know that some federal agencies in Kentucky have accepted state permits. A consistent federal response is necessary. Certainly that response should be no less than that expected from similar non-federal facilities in the Commonwealth.

We are returning the first two sheets of the application

form for completion of Items 6 and 12. Your full cooperation is earnestly solicited. We would appreciate receiving your response no later than Friday, December 8, 1972, so that the Commission can consider what further action it may desire to take at its December meeting.

Sincerely yours,

/s/ Frank P. Partee, Director
Frank P. Partee, Director

FPP/ce

Exhibit D

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF HEALTH
Frankfort

Wendell H. Ford
Governor

William P. McElwain, M.D.
Commissioner

November 29, 1972

Mr. Lynn Seeber
General Manager
Tennessee Valley Authority
411 New Sprankle Building
Knoxville, Tennessee 37902

Dear Mr. Seeber:

Since writing to you on November 10, 1972, concerning lack of compliance by federally owned facilities with Kentucky air pollution control requirements, the Attorney General here filed a complaint in the

United States District Court for the Western District of Kentucky (Louisville) on the same question.

This action was taken independent of the Commission, and the decision of whether or not to pursue a formal legal action on this matter is now obviously out of our hands. I regret that such action has been taken before the benefit of your response to our earlier inquiry.

Sincerely yours,

/s/ William P. McElwain
William P. McElwain, M.D.
Chairman
Kentucky Air Pollution
Control Commission

Exhibit E

January 19, 1973

Mr. Frank P. Partee, Director
Division of Air Pollution
Department of Natural Resources and
Environmental Protection
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

As provided for in APC-1, Section 1(1)(b) of the Kentucky Air Pollution Control Regulations, we are sending you TVA's proposed alternate sulfur dioxide control strategies for the Paradise and Shawnee power

plants and request your approval thereof. As explained in the statements, also enclosed, there are no feasible means for TVA to meet Kentucky's sulfur dioxide emission standard, which will be applicable for these two plants if the proposed alternate control strategies are not approved. However, such standard is not necessary to meet the sulfur dioxide ambient standards that have been established to fully protect public health and welfare from any known or anticipated effect of sulfur dioxide. Neither is the emission standard necessary to meet the requirements of the Clean Air Act for existing installations.

On October 13, 1972, TVA forwarded to you a control plan and schedule for achieving compliance with particulate emission standards at Paradise and Shawnee power plants. Since that time we have developed more detailed plans and schedules for achieving compliance with the particulate emission standards and these plans are also enclosed.

While all of the control plans and schedules reflect the best engineering decisions which can be made at the present time, better solutions for meeting the air quality standards may be devised in the future with additional engineering work. We will, of course notify you promptly of any intended changes. In addition, nothing contained in the plans should be construed as a waiver of any right to pursue any alternative which may be open to TVA under the Clean Air Act or any other applicable law.

If we can help in any way by providing additional

information, either in written form or in conferences with you or members of your staff, please let me know.

Sincerely yours,

/s/ F. E. Gartrell, Dr. P.H.
Director of Environmental
Planning

Enclosures Exhibit F

ENVIRONMENTAL PROTECTION AGENCY
REGION IV
1421 Peachtree St., N.E., Atlanta, Georgia . .309

October 17, 1972

Dr. F. E. Gartrell
Director of Environmental Research and Development
Tennessee Valley Authority
720 Edney Building
Chattanooga, Tennessee 37401

SUBJECT: Federal Agencies Compliance with Section 118 of Clean Air Act and Executive Order 11507

Dear Sir:

With reference to Section 118 of Clean Air Act, as amenled, Section 21 of the Federal Water Pollution Control Act, as amended, and Executive Order 11507, Federal facilities have a responsibility to cooperate with EPA and state pollution control efforts and programs. The purpose of this letter is to advise you of

these responsibilities and to recommend a course of action that will facilitate mutual Federal/State agreement on air and water pollution control compliance measures.

It is clear that Section 118 of the Clean Air Act requires Federal facilities to meet state air quality standards and emission limitations and to comply with deadlines established in the approved state air implementation plans. As you are aware, there has been considerable discussion regarding appropriate procedural mechanisms for obtaining Federal agency commitments to install air pollution abatement equipment and to make progress reports demonstrating adherence to pertinent standards, emission limitations and compliance schedules. These discussions have also addressed the extent to which Section 118 requires Federal agencies to comply with state and local procedural requirements for reports, permits, registration, inspection and data.

Our advice on this matter, at this time, is to provide the data specifically requested by the states with the approved state air implementation plans and (2) the abatement action facilities must take in order to meet implementation plan requirements.

We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compli-

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ance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records. Whenever a state makes a reasonable and specific request to review operating records, we recommend that your agency adopt an open-door policy by providing the requested data. We do not, however, encourage the submission of continuous reporting of routine operating data except on an "as needed" basis.

If a state uses a registration procedure to obtain discharge information, Federal facilities should file registration forms. However, we do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issuance of a state permit or license. The registration and other needed data should voluntarily be provided to the states by your agency. Our aim is to encourage Federal agencies to provide the states with all the information required to assess compliance of pollution sources with standards, emission and discharge limitations and the needs for additional abatement measures.

With respect to reporting of waste water treatment operations, we would like to make the same distinction as described above in regard to data needed to

determine if the facility is required to install additional abatement equipment or take other abatement measures as compared to routine operating data. If a state or EPA has reasons to believe that a waste water treatment facility is not adequate to meet water quality standards or is not being operated effectively, a specific request for information will be made. The facility should then provide, for a designated period of time, operating or monitoring data needed to complete that particular study and develop recommendations for additional remedial action.

We hope this advice and guidance will be beneficial to Federal facilities and aid them to respond to the immediate requirements of the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. If you should have any comments or questions regarding this subject matter, please contact Mr. Arthur G. Linton Chief, Federal Activities Office, (telephone number 404-526-5253).

Sincerely yours,

/s/ Jack E. Ravan
Jack E. Ravan
Regional Administrator

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 26, 1973

Exhibit G

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: Federal Facility Compliance with Federal, State and Local Air Quality Standards and Emission Limitations

I am requesting your assistance on a matter of considerable urgency relating to implementation of the Clean Air Act and Executive Order 11507. The Federal government should be in a position to report to the President by October 1, 1973 (see attached Schedule of Events), that all Federal facilities covered by Federal, State or local air quality standards and emission limitations are either in compliance or that corrective action is proceeding in accordance with an approved compliance schedule. Further, we should also be in a position to determine that funds to initiate construction of the necessary pollution prevention and abatement projects have been requested in prior years or will be requsted in the FY 1975 budget or as soon as possible thereafter. Planning should be underway, or should commence immediately, in order to meet the FY 1975 budget deadlines. To achieve this necessary goal, may I request your assistance in accomplishing the following:

1. Notify your facilities to contact immediately

the appropriate State air pollution control agency in order to provide that agency with sufficient data to allow it to make a determination of facility and source compliance or non-compliance. I realize that in many cases this action is already complete or underway. I believe, however, that an additional initiative is needed to ensure 100% completion of the following actions in a timely manner:

> For sources not in compliance, a compliance schedule should be negotiated with the State. EPA Regional Administrators will assist in resolving difficulties should they arise.
>
> It is EPA's view, expressed last year, that Federal facilities are not required to apply for State operating permits. However, if a State's compliance schedule process is based on a permit system, I would ask that your facilities provide the State with the required information on its registration form. I believe the form should be signed to verify the data, but with an appropriate disclaimer to make it clear that the facility is not applying for a permit. (If you have instructed your facilities to apply for a State permit, the disclaimer would, of course, be unnecessary.) As you know, there are several court cases now underway to determine the legality of State permits for Federal facilities. I believe that while

> the courts resolve this issue the Federal government should proceed with great urgency to ensure that every source in violation of air quality standards and emission limitations is covered by an approved compliance schedule and that resources and funds are marshalled in order to adhere to these schedules

2. A listing, by State, of those facilities or air pollutant sources which are not in compliance and have not been covered by a State approved schedule as of December 31, 1972.

3. A listing, by State, of those facilities or air pollutant sources that have been determined by the States to be in compliance as of March 31, 1973.

4. A listing, by State, of those facilities or air pollutant sources that will be covered by a State approved compliance schedule as of March 31, 1973.

May I request that you provide listings 3 and 4 cited above to my Office of Federal Activities by March 31, 1973, and listing 2 to the same office by February 15, 1973. I further request that you notify your facilities as soon as possible on the urgency of cooperating with the States and EPA in arriving at approved compliance schedules.

To keep informed all participants involved in developing approved compliance schedules for Federal facilities,

Filed March 16, 1973

[Title Omitted in Printing]

MOTION TO DISMISS

Defendants William D. Ruckelshaus, Administrator, Environmental Protection Agency; Jack E. Ravan, Administrator, Region IV; Environmental Protection Agency; Environmental Protection Agency; General Creighton Abrams, Chief of Staff, United States Army; Robert F. Froehlke, Secretary, Department of the Army; Major General W. R. Dosbory, Commanding General, United States Army Armor Center and Fort Knox; Major General John Cushman, Commanding General; Colonel Ernest A. Vuley, Jr., Commanding Officer; Department of the Army; James

R. Schlesinger, Chairman, Board of Directors, Atomic Energy Commission; Robert E. Hollingsworth, General Manager, Atomic Energy Commission; B. W. Stiller, Manager, Paducah Gaseous Diffusion Plant, Atomic Energy Commission; Union Carbide Corporation; and Atomic Energy Commission move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedures, to dismiss the Complaint filed herein for lack of jurisdiction over the defendants and over the subject matter of the suit, and for failure to state a claim upon which relief can be granted.

WHEREFORE, the above-named Defendants request this Court to Dismiss the Complaint filed by Plaintiff.

The defendants request that this motion be set for oral argument at a time convenient to the court.

Respectfully submitted,

KENT FRIZZELL
Assistant Attorney General
Land and Natural Resources
Division

MARTIN GREEN
Chief, Pollution Control Section

By: /s/ George J. Long
GEORGE J. LONG
United States Attorney

JAMES A. GLASGOW
Attorney, Department of
Justice
Washington, D. C. 20530
202-739-2808

Attorneys for Defendants

Attachments:

EXHIBIT NO. 1
EXHIBIT NO. 2
EXHIBIT NO. 3
EXHIBIT NO. 4
EXHIBIT NO. 5
EXHIBIT NO. 6

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

Exhibits 1 - 6

AFFIDAVIT OF ROBERT J. HART

Before me, Charles C. McNabb, Jr., as Notary Public in and for the State of Tennessee, County of Anderson, appeared Robert J. Hart, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Robert J. Hart, whose place of residence is 120 Newell Lane, Oak Ridge, Tennessee; that he is an employee of the Atomic Energy Commission, an agency of the United States of America; that his official position with the Atomic Energy Commission is Manager, Oak Ridge Operations Office; that the Paducah Gaseous Diffusion Plant, referred to in the

suit designated as Civil Action No. 7480-G, filed by the Commonwealth of Kentucky against the United States Atomic Energy Commission, in the Federal District Court at Louisville, Kentucky, is a facility owned by the United States of America as represented by the Atomic Energy Commission and under his management, control and jurisdiction; and that he is the Contracting Officer for the Government of the cost-type contract between Union Carbide Corporation and the United States of America, as represented by the Atomic Energy Commission (hereinafter referred to as AEC), under which Union Carbode Corporation manages, operates and maintains said facility for the AEC and in accordance with the directions and instruction of the AEC. Certified true copies of Modification No. 45 and No. 46 to Contract No. W-7405-Eng-26 between the United States and Union Carbide Corporation are attached as a part of this affidavit. Modification No. 45 is the latest complete rewrite and updating of the basic contract and prior modifications, and Modification No. 46 extends the contract term through June 30, 1973.

2. That the Paducah Gaseous Diffusion facilities include more than 100 buildings, including four major gaseous diffusion production buildings, two other major manufacturing buildings and associated buildings for, among other things, plant operation and control, plant shop and maintenance service, medical and dispensary services, plant heating and administration. The facilities are located on a tract of Government-owned land comprising some 3,670 acres. The Commission's investment for plant and equipment in these facilities is in excess of $795,000,000. The cost of operating and maintaining these facilities for the current fiscal year ending June 30, 1973, is estimated to be in excess of $95,000,000. This sum does not include the cost of feed materials for operation of the gaseous diffusion plants. Employed at the facility by Union Carbide Corporation are approximately 1,250 persons whose work and services are required for safe and efficient management and operation. AEC employees, as members of my staff, are physically stationed at the site for day-to-day surveillance of the operation for the AEC and general contract administration and program direction.

3. The purpose of the facility is the enrichment of uranium in the uranium isotope U-235. This involves the large-scale separation of the isotope U-235 from a chemical compound of uranium (in gaseous form) by the process of gaseous diffusion through porous barriers. These barriers must contain billions of holes smaller than two-millionths of an inch, withstand a pressure head of at least 15 pounds per square inch, and cannot be permitted to become enlarged or plugged up as a result of corrosion or rust coming from elsewhere in the system or as a result of the cooling of the gas and its reversion to a solid state. The separation process involves several thousand stages in each of which a portion of the gas-uranium hexafluoride (UF^6 — diffuses through the porous barriers and is enriched in U-235.

4. This process requires a continuous and un-

interrupted supply of electrical and other energy sources, controlled conditions of ventilation, temperature and humidity and a continuous and uninterrupted supply of materials. It involves in each of the several interconnected plants many miles of piping, many thousands of pumps and motors, and vast numbers of intricate electrical and electronic mechanisms to ensure proper operation. Electrical energy demand for the Paducah facility at present is some 16000 megawatts of which some 1000 megawatts is supplied by the Tennessee Valley Authority and some 600 megawatts by Electric Energy, Inc. The process system must be maintained under a negative atmospheric pressure. It must also be maintained as leakproof as possible to prevent decomposition of the circulating gas and damage to the operating equipment. The process once initiated must continue on a twenty-four-hour-per-day, seven-day-per-week basis since, among other things, the gas if permitted to lose temperature and cool in the system would revert to a solid state plugging and destroying the production process system. This is, of course, a very brief and simple statement of a very large and complex process operation.

5. The Paducah Gaseous Diffusion facility is a production facility of the United States as that term is defined in the Atomic Energy of 1954, and is one of only three such facilities owned by the United States and operated to supply the national need for enriched uranium. The other two such facilities are located one at Oak Ridge, Tennessee, and the other near Portsmouth, Ohio. All three facilities are under

the Oak Ridge Operations Office of AEC. The three gaseous diffusion facilities, while identical in many respects, are operated as a complex with each performing its portion or part of the overall process of producing the final product of enriched uranium materials to meet the needs of the United States for such product for national defense and peaceful uses of atomic energy such as fuel for nuclear power plants, medical uses, etc., and to meet the Nation's commitments to the "free world" nations for such material. Assuming continuous operation of the three at maximum capability and in the most efficient manner, the ability of the complex to meet the above needs is limited to only a short time period in the future. Thus, any disruption or slowdown of the process at any of these plants and reduction of the product produced would be a matter of serious national consequence.

Further affiant sayeth not.

/s/ Robert J. Hart
Robert J. Hart
Manager

Oak Ridge Operations Office
United States Atomic Energy
Commission

[Jurat Omitted in Printing]

Attachments:

1. Modification No. 46 to UCC
   Contract No. W-7405-Eng-26

2. Modification No. 46 to UCC
   Contract No. W-7405-Eng-26

STATE OF TENNESSEE }
COUNTY OF ANDERSON }

AFFIDAVIT OF JEROME F. WING

Before me, Charles C. McNabb, Jr., a Notary Public in and for the State of Tennessee, County of Anderson, appeared Jerome F. Wing, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Jerome F. Wing, whose place of residence is 714 Florida Avenue, Oak Ridge, Tennessee; that he is an employee of the Atomic Energy Commission, an agency of the United States of America; and that his official position with the Atomic Energy Commission at Oak Ridge, Tennessee (hereinafter referred to as AEC) is Chief, Environmental Protection Branch of the Safety and Environmental Control Division, Oak Ridge Operations Office, AEC.

2. That the Government-owned gaseous diffusion facility near Paducah, Kentucky, is one of the production facilities operated by the AEC and under the jurisdiction of the Oak Ridge Operations Office; that he is familiar with such facility and the duties and responsibilities of his office encompass the over-all evaluation and appraisal of the operation of the facility from an environmental standpoint.

3. That the AEC is in full accord with the program at both the State and national level to abate air and water pollutants; that AEC, Oak Ridge Operations Office, directly and through Union Carbide Corporation, the management and operating contractor at the Paducah gaseous diffusion facility, has an affirmative program and a competent professional staff to oversee, monitor and assure compliance with applicable air and effluent emission standards, including the air emission standards of the State of Kentucky, approved by the Environmental Protection Agency; and that AEC's and Union Carbide Corporation's professional environmental personnel have for a number of years had and maintained what was believed to be a cordial and cooperative working relationship with the State of Kentucky's professional environ-

mental personnel regarding both air and effluent emission sources at the AEC's Paducah facility.

4. That in 1968 the State transmitted to the operating contractor its forms for "Registration of Air Contaminant Sources" and by letter of July 3, 1968, to the State, AEC as a matter of comity and cooperation and using the State's forms identified the Paducah plant emission sources and supplied the State with the emission data from such sources, and invited the State Air Pollution Control Commission representatives to visit the site for further discussion and inspection of the plant operation.

5. On June 19, 1970, form APC-57, *Registration of Air Contaminant Sources,* was received from the Kentucky Air Pollution Control Commission relative to the Paducah gaseous diffusion facility and such form was completed and returned to the State Pollution Control Commission on July 2, 1970.

6. By letter dated June 15, 1971, the State transmitted its forms APC-110, *Permit Application For Air Contaminant Source,* relative to the Paducah gaseous diffusion facility. The information requested by these forms for air emission sources was completed using the State forms and returned to the State by letter from AEC dated July 23, 1971. The cover letter advised the State that while AEC did not consider the Kentucky permit requirements applicable to the Federal facility, AEC was happy to supply the information on a comity basis and as demonstrating the willingness of AEC to cooperate with the State within the framework of Executive Order 11507.

7. On June 29, 1972, Messrs. William S. Coakley

and Larry D. Wynn of the Kentucky Air Pollution Control Commission visited the Paducah gaseous diffusion facility for a meeting with AEC and Carbide environmental control staff and to review the air pollution abatement and monitoring practices relative to the facility's air emission sources. A number (some six or seven) of representative air emission sources were selected, visited and discussed. In the concluding critique, Messrs. Coakley and Wynn stated they were "favorably impressed" and appeared to be completely satisfied with AEC's pollution abatement program and with the data previously furnished the State.

8. To the best of affiant's knowledge and belief no emissions from any emission source at the Paducah gaseous diffusion facility exceeds the limitations provided for in the Kentucky air emission standards; and AEC has provided the State with air emission data for the Paducah gaseous diffusion facility emission sources sufficient to show that AEC is in compliance with the air emission standards or limitations of the State of Kentucky for air emission sources at such facility, and has supplied all information and data requested by the State or otherwise applicable to an emission source except for process information or data on a limited number of sources where such information or data is "Restricted Data" and classified national defense information relating to the plant production process which AEC is prohibited from disclosing to persons who are not authorized to receive such information under the Atomic Energy Act of 1954, as amended.

9. While AEC, as an agency of the United States, does not consider its operation of the Federal facility and

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its performance of its Federal functions as subject to the State's permit requirements, it does intend and expects to continue to work closely with the State Air Pollution Control Commission to enhance the air environment of the State, to monitor air emission sources at the Paducah facility and keep records thereon and to furnish such information and data to the State insofar as national security and classification requirements will permit, and to continue to operate the facility so as to comply with the State's air emission standards and limitations.

Further affiant sayeth not.

/s/ Jerome F. Wing
Jerome F. Wing, Chief
Environmental Protection
Branch
Oak Ridge Operations Office
United States Atomic
Energy Commission

[Jurat Omitted in Printing]

STATE OF TENNESSEE
COUNTY OF ANDERSON

SUPPLEMENTAL AFFIDAVIT OF JEROME F. WING

Before me, Charles C. McNabb, Jr., a Notary Public in and for the State of Tennessee, County of Anderson, appeared Jerome F. Wing, with whom I am personally acquainted, and who being duly sworn made affidavit as follows:

1. That he is Jerome F. Wing and that his place of residence and position with the United States Atomic Energy Commission at Oak Ridge, Tennessee, is the same as is set out in item 1. of an affidavit sworn to and subscribed before Charles C. McNabb, Jr., on January 30, 1973.

2. That the purpose of this affidavit is to supplement and make more particular item 8. of his affidavit of January 30, 1973, in which he affirmed that "To the best of affiant's knowledge and belief no emissions from any emission source at the Paducah Gaseous Diffusion facility exceeds the limitations provided for in the Kentucky air emission standards."

3. That the AEC Gaseous Diffusion facility at Paducah, Kentucky, is in the Paducah-Cairo region under the Kentucky Air Pollution Control Regulations and that the priority classification of air quality for such region is Priority I for particulates, Priority II for SO^2 and Priority III for CO, NO^2 and OX (HC).

4. That the major air emission source of interest at such facility is the emissions from the Indirect Heat Exchangers (Steam Plant); that the steam plant contains three boilers and was originally coal fired; that several years ago the AEC recognized the difficulty of achieving SO^2 and particulate compliance with such a coal-fired plant and in 1970 as a part of its air environment enhancement program converted such plant to a natural gas-fired plant with No. 2 fuel oil as a backup fuel. The stack emissions contain no particulates and are not visible. There is no significant sulfur in the primary fuel and the sulfur in the backup fuel is of a concentration that when burned meets the emission limits. This emission source is obviously in compliance with Kentucky Regulations Nos. AP-3 and AP-4 on particulates and SO^2. The three boilers for this steam plant are existing installations having rated capacities of less than 300 million B.T.U.'s per hour and are exempt under Kentucky Regulation AP-7, *Control of Nitrogen Oxides Emissions.*

5. That under Kentucky Regulation No. AP-2, *Control of Open Burning,* xxxx burning activities are carried on at the Paducah Gaseous Diffusion facility xxxxx.

6. That two existing incinerators are operated at the facility. The C-200 classified paper incinerator emission has an opacity less than Shade #1 on the Ringelmann Chart. The C-405 incinerator is equipped with a flue gas scrubber and for brief periods may exceed Shade #1 but not Shade #2 or the opacity guidelines as specified for existing incinerators in Kentucky Regulation No. AP-3, Section 1. (3) (a) and (b).

7. That for process operations particulate emissions, none of the some 25 process vents or emission sources emit visible particulate matter or any quantities in excess of those specified in Table 3.2 of Kentucky Regulation No. AP-3, Section 3.

8. Kentucky Regulation No. AP-5, *Control of Hydrocarbon Emissions From Stationary Sources,* is applicable to existing installations with respect to hydrocarbons which are in those regions classified as Priority I. The Paducah-Cairo region is classified as Priority III for hydrocarbons. Kentucky Regulation No. AP-6, Control of Carbon Monoxide Emissions, likewise is applicable to existing installations in those regions classified as Priority I. The Paducah-Cairo region is classified as Priority III for carbon monoxide.

9. That the Paducah Gaseous Diffusion facility in its air emissions is in compliance with the ambient air quality standards as specified in Kentucky Regulation No. AP-9, Sections 1. and 2.

10. That the basic information and arithmetical data substantiating the above compliance with the Kentucky Air Pollution Control standards and limitations was furnished to the State of Kentucky in July 1971; that the basic operation of the facility remains unchanged from that date; and that such information and data can be furnished to the Court if it so desires.

Further affiant sayeth not.

/s/ Jerome F. Wing
Jerome F. Wing, Chief
Environmental Protection
Branch
Oak Ridge Operations Office
United States Atomic Energy
Commission

[Jurat Omitted in Printing]

AFFIDAVIT

I, E. D. H. Berry, Colonel, Corps of Engineers, do hereby swear under oath that I am the Director, Facilities Engineering, US Army Armor Center and Fort Knox, Fort Knox, Kentucky, and that I have held this position since May 1972.

The purpose of this affidavit is to relate to the Court the actual state of air contaminant sources at Fort Knox, in reference to the general allegations made in paragraphs 28, 35, and 36 of the Complaint in the case of *Commonwealth of Kentucky* v. *Ruckelshaus, et al.*

In the order presented in paragraphs 28 and 35 of the above-mentioned Complaint, the following is a listing of present sources at Fort Knox classified as air contaminants and requiring registration under Kentucky regulations:

1. There are currently 48 oil burning indirect heat exchangers in the 0-10 million BTU per hour input range. For these units, the particulate emission rate is .107 (all references to emission rates for indirect heat exchangers will be given in pounds per million BTU input per hour), and the sulfur dioxide emission rate in .121. These rates are within the Kentucky standards for particulates of .75 [Table 3-1, Reg. No. AP-3 (all AP citations may be found in Exhibit B to the Complaint)] and for sulfur dioxide of 2.5 of 2.0 [Sec. 1(4), Reg. No. AP-4].

2. Two years ago there were 159 coal-fired indirect heat exchangers in the 0-10 million BTU per hour input range. 18 of these units are in buildings scheduled for tear down. (5 have already been torn down, 10 more are scheduled for tear down in 1973, and the remaining 3 are scheduled for fiscal year 1978.) 12 units have been converted to natural gas. 10 units are in the process of being converted to No. 2 fuel oil (6 of which are convertible from gas to oil, see subparagraph 7 below. As of 1 March 1973, this project was 85% complete, and the estimated completion date was 18 April 1973. The contract number is DACA 31-72—C-0191). 86 units are under contract for conversion to No. 2 fuel oil (50 of which are convertible from gas to oil, see subparagraph 7 below), with an expected completion date around November 1973. (The contract, DACA 31-73-C-0073, has been awarded, but work has not begun yet.) The remaining 33 were originally planned to be converted by personnel from my Directorate. However, lack of sufficient operations

and maintenance funds delayed accomplishment of these plans. Therefore, I have requested that this work be added as a supplement to the existing fuel conversion project under contract. (My office has sent preliminary information on this supplement to the Baltimore District Office of the Corps of Engineers. They in turn will supply my office with designs for the project. We then will submit the project to Headquarters, First U.S. Army, for approval. If approval is received, this project would be a supplement to contract DACA 31-72-C-0191, and the work could be completed by the end of 1973.) These 33 units exceed Kentucky emission rates — actual particulate emission rate is .77, allowable is .75 (Table 3-1, Reg. No. AP-3); actual sulfur dioxide emission rate is 5.24, allowable is 4.0 or 3.5 [Sec. 1(4), AP-4].

3. There are currently three incinerators utilized on Fort Knox. One is used to burn classified wastes and is within Kentucky emission rates — actual particulate emission rate is approximately .12 grains per standard cubic foot converted to 12% carbon dioxide, allowable is .20 grains converted to 12% [Sec. 1(3)(e)(ii), AP-3]. The other two incinerators are used to destroy pathological waste at Ireland Army Hospital. An air pollution survey of Fort Knox by the US Army Environment Hygiene Agency in 1967 did not mention these incinerators as excessive pollution sources. A similar survey in 1971 recommended that they be tested to determine whether they complied with Kentucky standards. This test was requested by this headquarters but was postponed by the Hygiene Agency several times due to manpower shortages. It was finally conducted on 30 January 1973, and it was determined that the incinerators exceeded Kentucky emission rates. In light of this information, I have directed my office to develop a project and request necessary funds to replace these two incinerators with a single unit meeting the Kentucky particulate emission standard. This project appears to be within the scope of operations and maintenance funds which can be approved either locally or at Headquarters, First U.S. Army, depending on the exact cost. This headquarters intends to design the project and have it ready to advertise for bids by the end of the second quarter of fiscal year 1974. Actual award of the contract and completion of work will be entirely contingent upon the availability of funds.

4. There are approximately 375 coal-fired stoves on the reservation. It is unlikely for more than 25% of these units to be used at any one time. These stoves are small units (approximately 60,000/BTU hour input) which are used as small space heaters, mainly in tents by soldiers in the field. They probably do not require registration, being analogous to the indirect heat exchangers used in residential buildings excepted by Section 4(4)(c), AP-1. If they are not so exempt, they do exceed the Kentucky emission limitations.

5. Stone crushing processing occurring on this installation complies with Kentucky regulations. Reasonable precautions are taken to prevent particulate matter from becoming airborne. Any dust which does arise settles out of visibility before crossing the boundaries of Fort Knox (Sec. 4, AP-3). Inasmuch as crushed stone is available from local sources, an engineering survey is underway to determine if stone can be economically purchased commercially.

6. Not mentioned in paragraph 28 of the Complaint but alluded to in paragraph 35, there are 1,441 gas-fired indirect heat exchangers at Fort Knox which would be classified as air contaminant sources under Kentucky regulations. These units are well within the Kentucky emission rates — actual particulate emission rate is .018, allowable is .75 (Table 3-1, AP-3); actual sulfur dioxide emission rate is .0057, allowable is 2.5 or 2.0 [Sec. 1(4), AP-4].

7. Finally, after completion of the contracts mentioned in subparagraph 2 above, there will be 93 units on post (including the 56 mentioned in subparagraph 2 above) which may be fired from either gas or oil. These units will primarily be fired by gas, but they will be changed to oil during extremely cold weather in order to preserve natural gas. Regardless of which fuel is used, under subparagraphs 1 and 6 above their emissions will be within Kentucky limitations.

8. There are no other known sources at Fort Knox which would require registration under Kentucky regulations.

The information outlined above is true and complete to the best of my knowledge.

/s/ E. D. H. Berry

E. D. H. BERRY
Colonel, Corps of Engineers
Director of Facilities

[Jurat Omitted in Printing]

AFFIDAVIT

State of Kentucky }
}
County of Fayette }

I, ERNEST A. VULEY, JR., being first duly sworn, depose and say that I am a Colonel, United States Army, presently assigned as the Commander, Lexington-Blue Grass Army Depot, Lexington, Kentucky.

In this position I am responsible for all operations of the installation. In the performance of its mission:

The Lexington-Blue Grass Army Depot, Blue Grass Activity, has a total of thirteen coal fired indirect heat exchangers having rated input capacities ranging from 1,000,000 BTU/hr to 7,800,000 BTU/hr. Based upon Preliminary Air Pollution Engineering Survey No. 21-007-71, conducted by US Army Environmental Hygiene Agency, Edgewood Arsenal, it would take sixteen of these units of this rated capacity to produce sufficient particulate emissions before the allowable limits would be exceeded. It was recommended that the units of this capacity be converted to No. 2 fuel oil to reduce particulate emissions. Three of these units have already been converted. Approval has been received for the conversion of the ten remaining units, funds have been allocated and material ordered to complete the conversion. It is expected that this project will be completed by 15 October 1973.

The Lexington-Blue Grass Army Depot, Ammunition Division, Directorate for Distribution and Transportation, operates a deactivation furnace at the Blue Grass Activity for the purpose of salvaging metallic components of deteriorated small arms ammunition and other small encased explosives. The burning process destroys the explosive materials and permits recovery of metal. An average of approximately five hundred tons per year are processed in this manner.

The Lexington-Blue Grass Army Depot, Lexington Activity, operates a central heating plant containing three coal fired spreader stoker boilers of a total rated input capacity of 143,000,000 BTU/hr. Combustion gases are vented to the atmosphere through a common stack. Engineering calculations indicate that particulate emissions from this plant exceed the allowable limits. Currently an approved Military Construction Army project is included in the FY-73 program. This project includes the installation of a cyclone collector, which will reduce particulate emissions by eighty-five percent. Estimated completion date 15 October 1973.

The depot has nine natural gas fired indirect heat exchangers which are used in family housing units. The furnaces have a rated capacity of approximately 50,000 BTU/hr, which is well within the prescribed standards. No additional control measures are deemed necessary for these units.

In addition to the contaminant sources cited above, the following operations are conducted at this installation which result in the generation of air contaminants:

(1) Open burning and detonation of military explosives and propellants. This operation is an accepted method of disposal. The contaminants released are minimal because burning is performed under strictly controlled surveillance;

(2) The operation of forty-seven No. 2 fuel oil fired indirect heat exchangers, forty-three of which have rated capacities less than 3,000,000 BTU/hr. Four units have rated capacities between 5,800,000 BTU/hr and 13,800,000 BTU/hr. The emissions from these units do not exceed allowable limits, therefore, no additional control measures are necessary; and

(3) Other areas of operation at this installation do generate emissions that are classified as air contaminants, such as electroplating, spray painting, solvent cleaning, sandblasting and wood working. The amount of emissions from these operations is insignificant, however, control measures have been taken to further minimize their environmental impact by installing hoods and air filtration systems.

IN WITNESS WHEREOF, I have set my hand this 2nd day of March, 1973.

/s/ Ernest A. Vuley, Jr.
ERNEST A. VULEY, JR.
COL, QMC
COMMANDING OFFICER

[Jurat Omitted in Printing]

[Title Omitted in Printing]

Affidavit

Before me, the undersigned authority, at Fort Campbell, on this 28th day of February 1973, personally appeared Mr. Robert Anderson, known to me to be the person whose name is subscribed to the following statement, who after being duly sworn deposes and says that:

1. The affiant is a resident of Hopkinsville, Kentucky.

2. The affiant has read the complaint in the above styled case and currently serves as Deputy to the Facilities Engineer. The Directorate of Facilities Engineer is the defendant's, Major General John H. Cushman, staff agency which has the responsibility for the operation and control of the air contaminant sources listed in paragraph 28(d) of the complaint.

3. Attached to this affidavit is a comparative listing of the Kentucky Emission Standards and computed emissions for each item listed in the complaint. The computed emissions are based on tables contained in a booklet entitled "A Compilation of Air Pollution Emission Factors for Combustion Processes, Gasoline Evaporation, and Selected Industrial Processes", published in May 1965 by the US Department of Health, Education and Welfare, Public Health Service, Division of Air Pollution, Cincinnati, Ohio. This listing will show all heating plants using gas and/or fuel oil are in compliance with the Kentucky standards as published by the Kentucky Air Pollution Control Commission. No actual test of the emission sources was made.

4. The attached comparison shows that Item 6, Item 7 and Items 9 and 10 are not presently in compliance with the Kentucky standards. The following additional information is added with respect to those items:

a. Item 6 — Building 7205. Although computations indicate that emissions from this plant slightly exceed the standards, it should be noted that it only operates five to six months out of the year. It is proposed to convert this plant to natural gas, thus, complying with the Kentucky standards in FY 1975. This conversion could be accomplished at an earlier date if additional natural gas becomes available from our supplier.

b. Item 7 — 25 buildings in the 5800, 5900, and 6100 blocks. These heating plants are also only operated five to six months per year. They may be fired but are not required to be fired unless the temperature falls below 35°F. Nine permanent gas fired motor repair shops programmed for construction in FY 1977 MCA program will replace these 25 temporary buildings. Fort Campbell has

requested appropriations for this project every year since 1966. However, this request has only been proposed to Congress once in FY 1970, and appropriations for construction were reused. Replacement of these shops has been requested because the buildings are badly in need of replacement and not necessarily to correct an air pollution problem. Thus, when the requirement came to eliminate air contaminant sources, conversion of these heating systems did not seem appropriate because of our projected plans to replace the buildings altogether. Further, the natural gas supplier for Fort Campbell has stated that he will only supply fuel for newly constructed facilities and not for converted heating systems. Conversion to natural gas is not possible now because that fuel is not available. Also, other cleaner burning fuels which would meet Kentucky standards are in short supply. Accordingly, Fort Campbell is waiting for approval for the funds necessary to construct these new motor repair shops to replace the buildings listed in Item 7 of the complaint. Presently, the appropriations are planned for in the 1977 MCA program. It should be noted at this point that in requesting the approval of programs for construction of the nine motor repair shops, elimination of an air contaminant source was not listed as a basis for approval action. However, when this program comes to the short range planning phase, this matter will be brought out. In addition to the twenty-five buildings listed in the complaint, Fort Campbell has fourteen additional motor repair shops with similar heating facilities now in operation. Since August 1972, the requirement to furnish these additional facilities has been placed on the Directorate of Facilities Engineering by the development of the 101st Airborne Division to a complete state of operational readiness. There are no other facilities available at Fort Campbell that would meet the minimum needs of the 101st Airborne Division and thus preclude the necessity of operation of these additional air contaminant sources. The additional buildings are planned for replacement in future MCA programs.

c. Items 9 and 10 — Buildings 6550 and 6548. These plants are also used only for space heating and operate some five to six months per year. These are temporary aircraft maintenance shops and will be replaced by permanent facilities that are either already under construction, approved by Congress for construction or proposed for construction in FY 1974 MCA program.

5. Further affiant sayeth not.

/s/Robert Anderson
ROBERT ANDERSON
Deputy Director
Facilities Engineering

[Jurat Omitted in Printing]

Complaint Building Number	Plant Capacity In Million BTU/HR	TYPE FUEL	KY. EMISSION STANDARD PARTICULATES (Lb/Million BTU)	KY. EMISSION STANDARD SO2 (Lb/Million BTU)	COMPUTED ACTUAL EMISSIONS PARTICULATES (Lb/Million BTU)	COMPUTED ACTUAL EMISSIONS SO2 (Lb/Million BTU)
Pathological incineration for which Kentucky issued construction permit						
2996	5.6	Gas	0.56	—	0.019	—
98	3.7	Gas	0.56	—	0.019	—
157	118.3	Gas	0.31	—	0.019	—
		Gas	0.31	1.7	0.084	0.33
7106	25.8	Gas	0.45	—	0.019	—
		Gas	0.45	2.2	0.084	0.33
7205	2.7	Coal	0.56	4.0	1.3	4.36
25 Bldgs in 5800; 5900 (Total for all bldgs) and 6100 Blocks	8.7	Coal	0.56	4.0	0.74	4.36
6256, 7042 and 7049 (Total for all bldgs)	8.4	Gas	0.56	—	0.019	—
6550 (Total for all 6 furnaces)		Coal	0.56	4.0	0.74	4.36
6948	0.576					
6926, 6938 and 6944	54.3 (Total for all 3 bldgs)	Coal	0.56	4.0	0.74	4.36
		Gas	0.375	—	0.019	—
6936	9.6	Gas	0.33	—	0.019	—
7251	22.5	Gas	0.43			
		Oil	0.43	2.22	0.084	0.33

Filed March 27, 1973

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS, TVA, WAGNER, SEEBER, McPHERSON AND CAVANISS

Comes the plaintiff, Commonwealth of Kentucky, Ex Rel Ed W. Hancock, Attorney General and moves the court for a summary judgment against the defendants, Tennessee Valley Authority, Wagner, Seeber, McPherson and Cavaniss on the ground that the pleadings of plaintiff with the affidavit of Harold G. Peters (attached as Exhibit 1), and the pleadings and exhibits of these defendants, shows that there is no genuine issue as to any of the following material facts: (1) Kentucky's permit system is its substantive control and abatement program for air pollution: (2) TVA owns and operates the Shawnee and Paradise Power Plants in Kentucky; (3) that each power plant has coal-fired boilers which emit air contaminants into the atmosphere of Kentucky (Exhibit 2): and (4) after having been requested to do so, TVA has refused to apply for and obtain a permit as required by Kentucky Air Pollution Control Commission Administrative Regulation AP-1. Plaintiff contends it is entitled to a summary judgment as a matter of law

against these defendants. Plaintiff's brief in support of this motion is attached hereto.

Plaintiff requests that this Motion be set for oral hearing at the convenience of the Court.

Respectfully submitted,

ED W. HANCOCK
ATTORNEY GENERAL

/s/ Kenneth A. Howe, Jr.
Kenneth A. Howe, Jr.
Assistant Deputy Attorney General
Capitol Building
Frankfort, Kentucky 40601

/s/ David C. Short
David C. Short
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

/s/ David D. Beals
David D. Beals
Assistant Attorney General
Capitol Building
Frankfort, Kentucky

COUNSEL FOR PLAINTIFF

[Certificate of Service Omitted in Printing]

Exhibit 1

AFFIDAVIT

The affiant, HAROLD G. PETERS, after having been first duly sworn, states as follows:

1. Affiant is employed in the Division of Air Pollution Control, Department of Natural Resources and Environmental Protection for the State of Kentucky. During most of 1972, I held the position of Acting Director of the Engineering Program of the Kentucky Air Pollution Control Commission. The Department of Natural Resources and Environmental Protection is the successor organization to Kentucky Air Pollution Control Commission, Department of Natural Resources and the Department of Environmental Protection.

2. Affiant's educational background includes a Bachelor of Science in Chemical Engineering from the University of Louisville, and a Masters Degree in Engineering from the University of Louisville and the University of Kentucky. I began my air pollution control work in June, 1965, as a Senior Sanitary Engineer with the Kentucky Department of Health.

3. Affiant states that the permit system of the Division is governed by Section 5, Kentucky Air Pollution Control Commission Administrative Regulation AP-1, and is separated into three parts, namely, construction, operating, and temporary operating per-

mits. The construction permit is required when a new air contaminant source is proposed or when an existing one plans an equipment addition or modification. All existing sources are required to apply for an operating permit and those sources operating an improper control system prior to compliance testing may receive a temporary operating permit which terminates at a specified time as noted as a condition to the permit.

4. Affiant states the processing of a permit application to operate normally begins with the Division's solicitation of permits from existing facilities. Upon receipt of the submittal, engineering evaluation determines the source's capability in meeting regulatory requirements, then the evaluating engineer either recommends approval or denial of the permit to operate.

5. Affiant states that the overall function of the permit system is to insure that installed or proposed air pollution control devices be of sufficient collection efficiency to minimize the pollution potential to within allowable limits. Also, existing facilities which are not in compliance are requested to submit a compliance schedule as part of the operating permit applications incorporating specific steps to be taken and definite measures to be followed.

6. Affiant states the permit application processing for a new source incorporates, in addition to the engineers in office evaluation of potential air pollution emissions, a field trip to inspect the facility capa-

bility to meet allowable limits, prior to approval of an operating permit.

7. Affiant states the permit system constitutes the preventative arm of the Division's air pollution control program and an effective tool for reducing air pollution from stationary sources; first by preventing operation of equipment which emits air contaminants in excess of allowable limits and, second, by preventing construction of uncontrolled sources. In the last case, the applicant reaps the cost benefit of installing control devises at the time of construction, rather than the more expensive retrofit procedure required on an existing facility.

8. Further, the affiant sayeth not.

/s/ Harold G. Peters

HAROLD G. PETERS

[Jurat Omitted in Printing]

CERTIFICATE

I, John Smithers, Acting Director of the Division of Air Pollution, Department of Natural Resources and Environmental Protection, state that I am the custodian of the records of the Division, which has its office and place of business for the Department at 311 E. Main Street, Frankfort, Kentucky. As the custodian of the records of the Division, I certify that the attached copy of a letter of August 14, 1972, and copies of the permit application forms from the Tennessee Valley Authority [Subject completed, unsigned Permit Application forms ommitted in herein Appendix] were received by the Kentucky Air Pollution Control Commission on August 15, 1972, and are true copies of same from the files of the Division of Air Pollution of the Department of Natural Resources and Environmental Protection which is the successor agency to the Kentucky Air Pollution Control Commission.

/s/ John T. Smithers

John Smithers

Acting Director of Division
of Air Pollution

Department of Natural
Resources and Environmental
Protection

TENNESSEE VALLEY AUTHORITY
CHATANOOGA, TENNESSEE 37401

August 14, 1972

Mr. Frank Partee, Director
Kentucky Air Pollution Control Commission
275 East Main Street
Frankfort, Kentucky 40601

Dear Mr. Partee:

With regard to the air contaminant source permit application forms that your staff sent us on July 13, 1972, it is our view that TVA, as a Federal agency, is not required to secure state permits in order to continue carrying out its operations and functions under the TVA Act, and it would accordingly not be appropriate for it to apply for permits. We are, however, anxious to cooperate with the State of Kentucky in the attainment of its declared air quality goals. We are therefore pleased to supply you with the same emission data and other information for TVA's Paradise and Shawnee power plants which your permit application forms are designed to elicit from applicants who are required to secure permits in order to continue their operations. For your convenience in utilizing the information we are supplying it on the APC permit forms even though, as indicated above, by using such forms we are not thereby applying for the issuance of permits. I shall be glad to answer any questions you may have concerning this position.

TVA is currently studying and evaluating possible alternative control measures which we might apply at those

TVA operations in Kentucky where emissions now exceed the emission standards contained in the Kentucky air pollution control regulations. We anticipate completing our plans and schedules for controlling particulate emissions by October 9, 1972. We will supply you with the copies thereof which we will be glad to discuss if you so desire. On the other hand, meeting Kentucky's standards

On the other hand, meeting Kentucky's standards with respect to sulfur dioxide emissions presents a more difficult problem. As you know, proven technology is not available to provide effective sulfur dioxide controls for large power plants and supplies of low sulfur fuels are presently not available to TVA in adequate quantities. The Environmental Protection Agency has recognized this state of affairs in the May 31, 1972, *Federal Register*. Although TVA is in the process of locating sources of low sulfur coal and will continue to carry out its extensive research program on the removal of sulfur dioxide from stack gases, it will be unable to submit a meaningful emission control plan for sulfur dioxide by January 1, 1973. As a consequence, TVA intends to submit an alternate control strategy to meet Kentucky's ambient air quality standards for sulfur dioxide. Such an alternate control strategy will be submitted by a date which will allow a reasonable time for the Commission to review the strategy and make recommendations and for TVA to make any necessary modifications before January 1, 1973. Although the details of our strategy are not yet available, we are enclosing a plan of the proposed ambient air quality monitoring which will be used to demonstrate that our strategy will achieve and maintain the applicable ambient air quality

standards. Should the Commission be unable to approve TVA's strategy before January 1, we hereby respectfully request an extension of the January 1 deadline until such time as TVA is able to satisfy the Commission with an acceptable alternate control strategy. Please advise us promptly if such an extension would be granted, as this information is essential in order for us to determine whether we must seek an exception from the Kentucky Standards pursuant to the Federal Clean Air Act.

TVA owns the mineral rights to several coal mines in Kentucky; however, only the Camp Breckenridge property in Union County is presently being mined. Since this mining is conducted by the Peabody Coal Company pursuant to the terms of a standard type coal lease which provides for a royalty to TVA based on tonnage mined, it is our view that Peabody is responsible for reporting any coal refuse piles. Therefore, no coal refuse information is supplied herein.

If we can help in any way by providing additional information at this time on our operations in Kentucky, either in written form or in conferences with you or members of your staff, please let us know.

Sincerely yours,

/s/ F. E. Gartrell
F. E. Gartrell, Dr. P. H.
Director of Environmental
Research and Development

Enclosures*** Completed, unsigned permit application of TVA omitted in printing.

Rendered 6-13-73
Entered 6-13-73

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE**

COMMONWEALTH OF KENTUCKY,
ex rel. ED W. HANCOCK,
Attorney General, **Plaintiff**

v.

WILLIAM D. RUCKELSHAUS,
Administrator, Environmental
Protection Agency, et al, **Defendants**

Civil Action No. 7480-G

ORDER

The Court, on its own motion, sets all pending motions in this action for oral argument at the hour of 10:00 A.M., on Monday, July 9, 1973, in the Court's chambers in Louisville, Kentucky.

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record.

Filed June 28, 1973
[Title Omitted in Printing]

MOTION

COMES the plaintiff and moves the Court to permit the filing of plaintiff's SUPPLEMENTAL BRIEF in this action and for support of said Motion states that defendant Tennessee Valley Authority has submitted an Alternate Control Strategy for approval by the Commonwealth of Kentucky which action is inconsistent with the position stated in their Briefs and their Motions before the Court in this action.

NOTICE

The defendants will take NOTICE that the foregoing MOTION will be delivered to the Clerk of the

United States District Court for the Western District of Kentucky, Louisville, Kentucky, this the 28th day of June, 1973, fr filing and to be considered at the convenience of the Court.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR PLAINTIFF.

[Certificate of Service Omitted In Printing]

Rendered: 7-9-73
Entered: 7-11-73

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY, ex rel
ED W. HANCOCK, Attorney General

vs. CIVIL ACTION NO. 7480-G

WILLIAM D. RUCKELSHAUS, Administrator
ENVIROMENTAL PROTECTION AGENCY, et al

ORDER

This case came on for hearing in the Court's chambers on Monday, July 9, 1973, and there appeared Honorable David Short and Honorable David Beals, Assistant Attorney Generals, on behalf of the Commonwealth of Kentucky; Honorable Robert Trevey, on behalf of the Department for Natural Resources & Enviromental Protection; Honorable James Glasgow, on behalf of all defendants, except T.V.A. and its officials; Honorable George J. Long, United States Attorney; Honorable Herbert Sanger, Honorable Beauchamp Brogan and Honorable Justin Schwamm, on behalf of the Tennessee Valley Authority and its officials; Honorable K. D. McCasland, on behalf of the Atomic Eenergy Commission; and Honorable Wilson Horde, on behalf of the Union Carbide Corporation.

Oral arguments of the parties having been heard, the Court finds the plaintiff has standing to bring this action but same may not be brought under the rules as a class action.

IT IS FURTHER ORDERED that the motion for summary judgment on behalf of all defendants, except T.V.A. and its officials; and the motion for summary judgment on behalf of Tennessee Valley Authority and its officials, be and the same are hereby SUSTAINED. Accordingly, counsel for the defendants shall each prepare and tender to the Court a proposed memorandum opinion reflecting the Court's expressed legal views as respects their clients.

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

DATED: July 9, 1973
Copies to all counsel.

Rendered: 8-10-73
Entered 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY,
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

MEMORANDUM AND ORDER

This suit, brought on behalf of the Commonwealth of Kentucky by State Attorney General Ed W. Hancock, raises an important question concerning the authority of the States to regulate Federal activities and installations[1] under the Clean Air Act of 1970, 42 U.S.C. Section 1857 et seq. In general, the plaintiff asserts that Federal entities operating equipment or installation which emit air contaminants *must secure a permit* from the Kentucky

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1. The Federal installations in question are: (1) Fort Campbell, Kentucky (home of the 101st Airborne Division); (2) Lexington-Bluegrass Army Depot, Lexington, Kentucky; (3) United States Army Armor Center and Fort Knox, Fort Knox, Kentucky; (4) Paducah Gaseous Diffusion Plant, Paducah, Kentucky, and (5) Installations operated by Tennessee Valley Authority.

Polution Control Commission before operating such equipment. The permit requirement in question appears in Section 5 of the Kentucky Air Pollution Control Commission Regulations AP-1. Section 5, which was part of the air implementation plan which Kentucky submitted to the Federal Government pursuant to Section 110 of the Clean Air Act of 1970, 42 U.S.C. Sec. 1857f provides in pertinent part as follows:

> (1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, *unless a permit therefor* has been issued by the Commission and is currently in effect. (Emphasis ours.)

The plaintiff further alleges that "Kentucky's Plan became Federal law pursuant to Sections 110, 113, and 118 of the Clean Air Act of 1970 . . . [and] Section 118 of the Clean Air Act of 1970 requires that 'federal facilities' comply with the approved Kentucky Plan . . ." Complaint, page 13.

In his prayer for relief, the Attorney General seeks a mandatory injunction requiring the defendants[2], except for the Environmental Protection Agency and its defendant-officers, to "apply for and to obtain permits from

2. All of the defendants except the Tennessee Valley Authority (TVA) and its officers were represented by the United States Department of Justice. The TVA was represented by its own attorneys. For clarity, the defendants are sometimes alluded to as (1) non TVA defendants; and (2) TVA defendants.

the Kentucky Air Pollution Control Commission . . ." (Complaint p. 25). Also, a prohibitory injunction is sought restraining the defendants "from refusing to comply with the provisions of Section 118 of the Clean Air Act of 1970." (Complaint p. 25). With respect to the EPA and its officers, the prayer requests that they be "[o]rdered to commence appropriate action under Section 113 of the Clean Air Act of 1970 to obtain full compliance by the defendants . . . with the Kentucky plan . . . ." A declaratory judgment and relief in the nature of mandamus are also sought.

The TVA defendants moved to dismiss, or, in the alternative, for summary judgment. A motion to dismiss was filed by the non-TVA defendants. The plaintiff countered with a motion for summary judgment against the TVA defendants.

When these motions came on for hearing, it was apparent that it would be necessary, in the disposition thereof, that the Court consider matters in the nature of all affidavits and exhibits outside the pleadings. Rule 12b, F.R.C.P. Accordingly, it was agreed by all parties by counsel, that there being no issue of material fact as pertained to the legal defenses asserted, the Court without objection, considered the entire matter as on cross-motions for summary judgment.

Only issues of law are before this Court.[3] These

3. The non-TVA defendants have submitted affidavits attesting that their installations, with a few minor exceptions which are being corrected, are in compliance with Kentucky's emission standards. The plaintiff has made contrary allegations. These factual disputes need not be tried,

issues are: (1) whether the Clean Air Act of 1970 requires that the defendants obtain state permits before operating equipment which emits substances into the ambient air and (2) whether the doctrine of sovereign immunity is a barrier to maintenance of this suit.

THE PERMIT ISSUE

Congress recognized that Federal facilities emitted appreciable amounts of various substances into the ambient air. Therefore, it provided in Section 118 of the Clean Air Act for control of pollution from Federal facilities. In pertinent part, Section 118 provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property of facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

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however, since matters of law control the disposition of the case. TVA has submitted to Kentucky detailed information concerning emissions from its facilities as required by Kentucky and in the form requested. TVA has also submitted plans and schedules for complying with Kentucky's emission standards. In furnishing such information, however, TVA informed Kentucky that while TVA fully intends to comply with its obligations under Section 118 of the Clean Air Act, those obligations do not include securing of state permits (Affidavit of Lynn Seeber). TVA accordingly has not applied for or obtained permits.

The question which is squarely before this Court is whether Congres intended, by enacting Section 118, to require the Federal Government to obtain permits from state agencies before operating equipment which generated air contaminants. Since this question must be answered in the negative, the defendants' motions must be granted.

All defendants contend that the requirement, in Section 118, that Federal entities "comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution" simply means that Federal facilities must comply with the emission standards and implementation plans of Sections 109 and 110 of the Act and, except for new facilties, the monitoring and other requirements of Section 114. The legislative history of the Act supports the defendants' interpretation of Section 118.

The Clean Air Act of 1967, 77 Stat. 392, Section 111, required that Federal agencies shall "to the extent practicable and consistent with the interest of the United States and within any available appropriations, cooperate with the Department of Health, Education and Welfare and with any air pollution control agencies in preventing and controlling the pollution of the air . . . " This provision was changed by the Clean Air Act Amendments of 1970. The following analysis of the legislative history of Section 118 of the Clean Air Act provides an indication of Congress' intent concerning the change from the provision in the 1967 Act to the one in the 1970 Amendments.

On June 10, 1970, the House of Representatives

passed H.R. 17255, a bill to amend the Clean Air Act of 1967. This bill would have required each Federal agency to "comply with the applicable Federal, State, interstate, and local *emission standards* and with the purpose of this Act . . ." [emphasis supplied]. H.R. 17255, 91st Cong., 2d sess., sec. 111 (1970). The House Report on the bill states, "The legislation directs Federal agencies in the executive, legislative and judicial branches to comply with applicable Federal, State, interstate, and local *emission standards.*" H. Rept. No. 91-1146, 91st Cong., 2d sess., p. 4 (1970). On September 22, 1970, the Senate passed S. 4358, a different bill to amend the Clean Air Act of 1967. The bill would have directed each Federal agency to "comply with the *requirements* of this Act in the same manner as any other person would so comply . . . " [emphasis supplied]. S. 4358, 91st Cong., 2d sess. sec. 118 (1970). The Senate Report on the bill states, "This section requires that Federal facilities meet the *emission standards* necessary to achieve ambient air quality standards as well as those established in other sections of Title I" [emphasis ours] S. Rept. No. 91-1196, 91st Cong., 2d sess., p. 23 (1970). Other sections of Title I of the Senate bill set forth emission standards for "new sources" (§112), "selected air pollution agents" (§114), "hazardous air pollution agents" (§115), and inspection, monitoring and entry provisions (§116). The above statement from the Senate Report clearly indicates that the "requirements" which the Senate bill would have Federal facilities comply with were the substantive emission "standards" set

forth in the Act and other Title I provisions. The Senate bill did not require, any more than the House bill, Federal compliance with State procedures. Both the House and Senate language were changed by the Conference Committee. The new language, which was enacted by Congress, requires Federal facilities to "comply with Federal, State, interstate and local requirements respecting control and abatement of all pollution to the same extent that any person is subject to such requirements." Concerning this new language, the Conference Report states, "The House bill and the Senate amendment declare that Federal departments and agencies should comply with applicable standards of air quality and emission." H. Rept. No. 91-1783, 91st Cong., 2d sess., p. 48 (1970).

It seems apparent, therefore, that Congress at all times contemplated a self imposed policy of Federal compliance with all applicable standards, but at no time contemplated subjecting Federal facilities to State procedures. If Congress had intended to abandon the well established doctrine, which has its basis in the Supremacy Clause, that the Federal Government is immune from attempts by states to subject it to state regulatory measures,[4] it would have so stated.

It must be noted, moreover that, Congress was sensitive to the issue of federal-state relations in enact-

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4. Eg. *McCullogh v. Maryland*, 4, Wheat. 316 436 (1819); Ohio *v. Thomas*, 173 U.S. 276 (1899); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

ing the Clean Air Act and, in a number of instances, expressly stated the manner in which Federal and State authority would interact in the case of Federal facilities. Since Congress expressly granted authority to the states concerning some aspects of the Clean Air Act's impact on Federal facilities, the plaintiff's argument is, in essence, based on the contention that certain other grants of authority to the states must be implied from the phraseology of Section 118 of the Act. Such an argument flies in the face of the principle that ,where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent. 2 J Sutherland, *Statutory Construction* sec. 4915 (3 ed. 1943).

Cases decided to date which support the conclusion arrived at herein include *California* v. *Stastny,* 4 ERC 1447 (C.D. Calif. 1972), appeal pending 9th Circuit, and an unreported order in *State of Alabama, et al* v. *Seeber, et al* (N.D. Ala., No. 72-939), June 5, 1973. Notice of appeal filed June 28, 1973. In *Stastny,* the court held that "[d]efendants are not required to either apply for or obtain permits from the Air Pollution Control District prior to operating or using any equipment or machines at the naval base at Long Beach, California." 4 ERC at 1448. In *Seeber,* the court dismissed a complaint which was quite similar to the one at bar.

We further note that a permit has absolutely nothing to do with air quality. The substantive requirements of the implementation plan (e.g., emission standards and compliance schedules) do, and it is those "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements" which are essential to the improvement of air quality and are, we believe, the "requirements respecting control and abatement of air pollution" to which section 118 of the Clean Air Act refers.

THE CLAIM AGAINST THE EPA

In its second claim for relief, the plaintiff contends that the defendant Ruckelshaus,[5] Ravan and the Environmental Protection Agency have violated Section 113 of the Clean Air Act, 42 U.S.C. sec. 1857c-8, by failing" to commence appropriate actions . . . to compel compliance with the Kentucky Plan as to permits to operate, time schedules, and emission limitations . . . " (Complaint para. 42). In paragraph 41 of the complaint, the plaintiff contends that there are "widespread violations of the Kentucky Plan, because of the inability of the Commonwealth of Kentucky to effectively enforce its rules and regulations."

Since, as is held above, the defendants correctly construed their responsibility with respect to applying for a state permit, the plaintiff's claim against the EPA and its officers does not state a claim upon which relief

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5. Pursuant to Rule 25(d) (1) F.R.Civ.P., Robert Fri, Acting Administrator of the EPA, has been substituted as a defendant in place of William Ruckelshaus since Mr. Ruckelshaus has resigned from his former position as Administrator of EPA.

can be granted, for it was based on the assumption that the defendants misconceived their duty with respect to applying for permits. In any event, Section 113(a) of the Clean Air Act clearly grants the Administrator discretionary authority and, consequently, the Administrator's failure to take action under Section 113(a) is unreviewable since it was agency action "committed to agency discretion by law." 5 U.S.C. sec. 701. *See eg., United States* v. *Walker,* 409 F.2d 477 (C.A. 9, 1970).

SOVEREIGN IMMUNITY

All defendants have vigorously asserted that the doctrine of sovereign immunity is a barrier to the plaintiff's suit. Since the doctrine is applicable it serves as an alternate basis for this Court's order.

Although the plaintiff listed in its complaint a number of statutes as the basis for this Court's jurisdiction in the matter,[6] the plaintiff has apparently chosen to rely upon the Clean Air Act of 1970, 42 U.S.C. Section 1857 *et seq.,* with respect to the question of waiver of sovereign immunity.[7]

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6. The plaintiff alleges, on page one of its complaint, that "(T)his action arises under the Fifth, Ninth, and Fourteenth Amendments of the Constitution of the United States of America; U.S.C. Title 42, Section 1331; U.S.C., Title 42, Section 1857, et seq.; U.S.C., Title 5, Section 702; U.S.C., Title 28, Section 2201, et seq., and U.S.C., Title 28, Section 1361."

7. The defendants argued that the statutes listed in footnote six supra, did not vest this Court with jurisdiction. In its memoranda opposing the defendants' motions to dismiss and for summary judgment, the plaintiffs relied entirely on the Clean Air Act and did not urge that this Court had jurisdiction under any of the other statutes which it had invoked in its Complaint.

The sovereign immunity argument may best be analyzed in two steps. The first consideration is whether this suit, although in form against officers and agencies of the Federal Government, is actually a suit against the sovereign. Once we determine that this suit is against the sovereign, then we must also determine whether there has been a waiver of sovereign immunity in this instance.

To determine whether this suit against officers and agencies of the Federal Government must be treated as a suit against the sovereign, this Court is required to consider whether the suit would expend itself "on the public treasury or interfere with the public administration." *Dugan* v. *Rank,* 372 U.S. 709, 620-621 (1963). For if the relief sought would interfere in a substantial way with important government functions, the suit, although nominally directed against individuals, is "a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic and Foreign Corporation,* 337 U.S. 782, 688 (1949).[8] In referring to

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8. The sovereign immunity doctrine is also applicable to the Union Carbide Corporation since the Complaint herein only concerns Union Carbide's role as a contractor whose actions are subject to the direction and control of the Atomic Energy Commission. See *Varson v. Roane-Anderson Co.,* 342 U.S. 232, 236 (1952); *United States v. Boyd,* 378 U.S. 39 (1964).

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sovereign immunity, the Sixth Circuit recently said:

> Perhaps the minimum statement of that doctrine is that litigation must not be allowed to stop government in its tracks. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S. Ct. 1457, 93 L.Ed. 1628 (1949). In this regard the effect of the action upon the sovereign rather than its form is controlling. The fact that the defendants are all named as individuals does not change the result [*Ogletree v. McNamara,* 449 F.2d 93 (C.A. 6, 1971)].

The question which this Court must address is whether this suit is barred because the relief which the plaintiff requests would interfere with basic functions of national defense and the carrying onward of congressionally authorized activities. Even Professor Davis, one of the foremost critics of the sovereign immunity doctrine, has acknowledge that:

> The most persuasive reason for sovereign immunity that has been found in reports of cases is a remark in a dissenting opinion of 1882, that "The sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war, necessary to guard the national existence against insurrection and invasion . . . " [*United States* v. *Lee,* 106 U.S. 196, 226 (1882)] Judicial interference would surely be harmful if the government were dispossed of its military bases and equipment during

> an emergency. [K. Davis, Administrative Law Text 498 (3d ed. 1972)].

This Court is persuaded that, if the plaintiff's arguments were accepted, the plaintiff could, although it disavows any intention of doing so, interfere with the execution of important Federal actions. In reaching the above conclusion, this Court has not ignored the provision, in Section 118 of the Act, that "[t]he President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ." The foregoing provision does not dispel the possibility that the plaintiff's permit powers, if applied to the defendants, might seriously interfere with important Federal functions. First, Section 118 limits the President's authority to grant an exemption to situations where the President has "requested such appropriation [for air pollution control] as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation." Moreover, the President is not empowered to grant exemptions with respect to new stationary sources. It is readily apparent, therefore, *that Section* 118 *does not grant the President sufficient authority to sweep aside all interference with vital Federal functions which may arise if the plaintiff were allowed to impose its permit power on the defendants.* The rationale supporting sovereign immunity in this case is, therefore, undiminished.

With respect to the question of whether Congress has waived the sovereign immunity of the United States, only a brief examination of the statutes relied upon by the plaintiff, with the exception of the Clean Air Act, is necessary.

28 U.S.C. Section 1331 has never been construed as a waiver of the sovereign immunity of the United States from suit. E.g., *Anderson* v. *United States,* 225 F.2d (C.A. 5, 1956); *Cotter Corporation* v. *Seaborg,* 370 F.2d 686 (C.A. 10, 1966). Moreover, the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202, is procedural in nature and does not enlarge the jurisdiction of the district courts or waive the sovereign immunity of the United States. *E.G., White* v. *Administrator of General Services Admin.,* 343 F.2d 444 (C.A. 9, 1965); *Donnely* v. *Mazar Shrimp & Oyster Co.,* 190 F.2d 409 (C.A. 5, 1951). As has been decided on many occasions, 28 U.S.C. Section 1361 did not waive sovereign immunity since it was only intended to ease the burden of proceeding against officials formerly suable only in the District of Columbia. E.g., *Jarret* v. *Resor,* 426 F.2d 213 (C.A. 9, 1970); *Carter v. Seamans,* 411 F.2d 767 (C.A. 5, 1969). Although the plaintiff also invokes the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States, it is settled beyond doubt that constituional provisions have no effect upon the sovereign immunity from suit. *E.g., Lynch* v. *United States,* 292 U.S. 599 (1934).

The plaintiff also cites the Administrative Procedure Act, 5 U.S.C. Section 703, *et seq.* In the Sixth

Circuit, the A.P.A. is not deemed an independent grant of jurisdiction or a waiver of sovereign immunity. *Sierra Club* v. *Hickel,* 467 F.2d 1048, 1054 (C.A. 6, 1972).[9] *cert. den.* 41 U.S.L.W. 3525,

We now arrive at the critical question concerning waiver of sovereign immunity: whether Congress intended, by enacting the Clean Air Act, to waive the Federal Government's immunity from a suit attempting to compel ofifcers in charge of Federal installations to obtain state permits for equipment which discharges pollutants into the ambient air. The plaintiff contends that, by enacting Section 118 of the Clean Air Act, 42 U.S.C. sc. 1857f, Congress waived the sovereign immunity of the United States. Section 118 does not expressly waive the sovereign immunity of the Federal Government. The plaintiff has attempted to overcome the absence of express language concerning waiver by quoting from the debate on the House and Senate versions of the Clean Air Act of 1970. Putting aside the small weight which is usually given to debate on the floor in resolving questions of statutory interpretation, the debate upon which the plaintiff relies simply does not address the question of whether Congress intended that Federal installations must submit

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9. After thoroughly reviewing the relationship of the A.P.A. to the doctrine of sovereign immunity, the Fourth Circuit also concluded that "the doctrine of sovereign immunity applies independently of the judicial review provisions of the A.P.A." *Littel v. Morton,* 445 F2d 1207, 1213 (C.A. 4, 1971).

permit applications to states which have incorporated a permit provision in their implementation plans.

In two sections of the Clean Air Act, Congress provided judicial remedies and, in so doing, waived the sovereign immunity of the United States. Section 304 and 307; 42 U.S.C. sections 1857h-2 and 1857h-5. It is axiomatic, however, that a waiver of sovereign immunity is coextensive with the remedies which Congress provided. That Congress did not provide a remedy with respect to the Government's decision that a state permit need not be obtained must be carefully noted.

For the reasons discussed above, it is obvious that Congress did not unequivocally waive the sovereign immunity of the United States from suits attempting to compel its officers to obtain permits from state agencies before discharging, from Federal facilities under their control, substances into the ambient air.

It has been settled law since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that by virtue of Article VI, clause 2 of the Constitution there is an entire absence of power on the part of the states to subject instrumentalities of the Federal government to state regulation or control. And, as said in *Mayo* v. *United States*, 319 U.S. 441 (1943):

> This freedom is inherent in sovereignty . . . where . . . Congress does not *affirmatively declare its instrumentalities or property subject to regulation* or taxation, *the inherent freedom continues* [pp. 447-48].

An intention by Congress to depart from this long settled principle *cannot be inferred or implied.* In the words of the Supreme Court, there must be a *"clear* congressional mandate." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954). "Cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969). *Soriano* v. *United States*, 352 U.S. 270 (1957).

If the Congress intended such a mandate in the present situation, we must assume that it would have said so *plainly*, as it has done when it did so intend.[10]

Since the plaintiff has not shown an "unequivocal waiver" of sovereign immunity, its arguments, concerning waiver are not persuasive.

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10. See for example, section 10 of the Federal Control Act (40 Stat. 456 (1918), which provides in pertinent part:

> "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law . . . . Actions at law or suits in equity may be brought by and against such carriers . . . and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government."

See also section 304 of the Clean Air Act, 42 U.S.C. §1857h-2 (1970).

PROCEDURAL ASSERTIONS

The TVA defendants additionally raised two procedural defenses:

(1) Whether the Attorney General of Kentucky had the power to maintain this action absent the request and consent of the Kentucky Air Pollution and Control Commission, and

(2) Whether the action, which purports to be a Class Action on behalf of "all citizens, counties, political subdivisions and agencies of the Commonwealth of Kentucky," is maintainable as a Class Action.

For the benefit of our judicial superiors on appeal we wish to clearly express our reaction to the above that they might have before them laid out cold our entire reaction, thus:

As to No. (1) above. The dispute centers around the meaning of KRS 224.991, which provides in part as follows:

> (2) It shall be the duty of the Attorney General, *upon the request of the commission* . . . to bring an action for an injunction against any person . . . violating or threatening to violate any order or determination of the commission . . . .
>
> * * *
>
> (4) The authority herein vested in the Attorney General, *upon request of the commission*, to bring actions for injunctions . . . shall be exclusive.

It is undisputed that no such request has been made by the Commission, and that, in fact, TVA was engaged in discussions with the Commission concerning TVA's interpretation of Section 118 at the time this action was filed. The Attorney General admits that the General Assembly can restrict his authority to bring actions, but contends that KRS 224.991 is not such a restriction. He contends that the statute merely makes it his duty to bring actions upon the Commission's request, but does not expressly prohibit him from bringing actions without such a request. Although the matter is not free from doubt, the Court is inclined to agree, that in the circumstances of this case, the Attorney General can maintain the action without a request from the Commission.

As to the Class Action assertion, the TVA defendants maintain that this action cannot be brought as a Class Action. The Court agrees. KRS 224.991(4) provides:

> *The authority herein vested in the Attorney General . . . to bring actions for injunctions for violations* of KRS 224.310 to 224.460 or of *any regulation*, or order issued thereunder, *shall be exclusive*. Nothing herein contained shall abridge the right of any person to recover actual compensatory damages resulting from any such violation.

Such language clearly shows the intention of the Kentucky General Assembly to debar actions for *injunctive* relief from alleged violation of Commission regulations to *all* entities in Kentucky *except* the Attorney General acting on behalf of the Commission, who has "exclusive" power to seek such relief. Moreover, any duty to obtain a permit under these regulations as owed *only*

to the Commission, not to "all citizens, counties, political subdivision and agencies of the Commonwealth." There are no questions of law or fact common to the alleged class, and plaintiff is not a member of the class sought to be represented. The action is not a proper class action under Rule 23. FED.R.Civ.P.

Plaintiff seeks to justify a class action on the basis of Section 304 of the Clean Air Act, 42 U.S.C. §1857h-2, which provides in part:

> Except as provided in subsection (b) of this section, any person may commence a civil action *on his own behalf* . . . .

Not only does this statute not provide for class actions, but its legislative history expressly states that such actions are prohibited. Section 304 originated in S. 4358, 91st Cong., 2d Sess. (1970). The Senate Committee Report on that section states:

> *Section 304 does not authorize a "class action."* Instead, it would authorize a private action by any citizen or citizens acting *in their own behalf.* [S.Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970)].

This section pertaining to citizen suits was adopted by the Conference Committee and was enacted into law as Section 304 of the Clean Air Act. Accordingly, this action cannot be maintained as a class action under either Rule 23 or the Clean Air Act.

Accordingly, the Court is of the opinion that all motions of all defendants for summary judgment are due to

be denied. A separate judgment to such effect will be entered herwith.

SO ORDERED.

August 10, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Rendered: 8-13-73

Entered: 8-13-73

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF KENTUCKY
AT LOUISVILLE

COMMONWEALTH OF KENTUCKY.
Ex Rel ED W. HANCOCK,
Attorney General, Plaintiff

v. Civil Action No. 7480-G

ROBERT FRI,
Acting Administrator,
Environmental Protection Agency,
et al, Defendants

JUDGMENT

It is ordered and adjudged that the motion of plaintiff for summary judgment be and same is OVERRULED, and the motions of all defendants for summary judgment herein be and the same are hereby SUSTAINED; and this action is, accordingly, dismissed at the plaintiff's costs.

August 13, 1973

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Filed Sept. 9, 1973

[Title Omitted in Printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, plaintiff herein, hereby APPEALS to the United States Court of Appeals for the Sixth Circuit from the Order of this Court entered on the 11th day of July, 1973, and the Judgment of this Court entered on the 13th day of August, 1973, wherein the Motion for Summary Judgment on behalf of all defendants, except Tennessee Valley Authority and its officials, and the Motion for Summary Judgment on behalf of Tennessee Valley Authority and its officials were sustained.

NOTICE

Please take Notice that the foregoing NOTICE OF APPEAL will be mailed to the Clerk of the Court for filing on the 6th day of September, 1973, to be considered at the convenience of the Court.

ED W. HANCOCK
ATTORNEY GENERAL

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
309 Shelby Street, Room 111
Frankfort, Kentucky 40601
(Telephone: (502) 564-3595)
COUNSEL FOR PLAINTIFF

[Certificate of Service Omitted in Printing]

Filed 12/7/73

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, Ex Rel
ED. W. HANCOCK,
Attorney General, Plaintiff-Appellant,

VS:- MOTION TO DEFER FILING OF
APPENDIX TO DECEMBER 12, 1973
No. 73-2099

RUSSELL E. TRAIN, Administrator,
Environmental Protection Agency, et al,
Defendants-Appellees.

COMES the appellant, by Counsel, and states to this Honorable Court that it will be mechanically impossibe for Appellant to file the Appendix in this action on December 10, 1973, but that the Appendix will be completed and ready for filing on December 12, 1973, at which time Briefs will also be served in final form.

Appellant, therefore, moves this Honorable Court to permit said deferred filing of the Appendix for the reasons above-stated and submits the attached letter in support thereof.

Final Extension To 12/17/73 Granted
Entered By The Clerk Pursuant To Rule 4(F)
Sixth Cir. Rules.
James A. Higgins, Clerk

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

/s/ David C. Short
By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW
COMMONWEALTH OF KENTUCKY

/s/ David D. Beals
By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW
COUNSEL FOR APPELLANT

[Certificate of Service Omitted in Printing]

Filed 3/5/74

[Title Omitted in Printing]

MOTION TO FILE AMICUS BRIEF OUT OF TIME

TO THE HONORABLE COURT OF APPEALS:

COMES NOW the State of Texas by and through John L. Hill, Attorney General of Texas, and files this its Motion for Leave to File an Amicus Brief in support of Appellant Commonwealth of Kentucky and would show the Court the following:

1. Rule 29 of the Federal Rules of Appellate Procedure provides that a state need not secure consent of the parties or leave of Court to file an amicus brief, but that any such brief must be filed within the time allowed the party whose position as to affirmance or reversal such brief will support. However, the State of Texas is seeking to file its Brief out of time as it did not learn of the appeal of the instant case in time to permit preparation of its Brief by the date upon which the Commonwealth of Kentucky filed its Brief.

Motion Granted 3-18-74

2. The State of Texas believes the importance of this case requires that all the issues be thoroughly analyzed and that the Court would be well served by an amicus brief from the State of Texas, even though filed out of time.

3. The undersigned attorney respectfully requests that he be allowed to appear on behalf of the State of Texas *pro hac vice*. Said attorney is not now a member of the Bar of the Sixth Circuit Court of Appeals, but has requested the Clerk to forward such forms as are necessary for application.

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Honorable Court grant it leave to file an amicus brief out of time in support of the Commonwealth of Kentucky, and that it allow the undersigned attorney to appear on behalf of the State of Texas *pro hac vice*.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

/s/ .....
PHILLIP K. MAXWELL
Assistant Attorney General

Attorneys for the State of Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4143

[Certificate of Service Omitted in Printing]

Decided 6/5/74
Filed 6/5/74

No. 73-2099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY
Ex Rel., ED HANCOCK, Attorney
General, Plaintiff-Appellant,

v.

WILLIAM D. RUCKELSHAUS, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.

Appeal from the United States District Court for the Western District of Kentucky

Decided and Filed June 5, 1974.

Before: Weick and Lively, Circuit Judges; and Cecil, Senior Circuit Judge.

Lively, Circuit Judge. This case is concerned with the Clean Air Act Amendments of 1970 (the Act), and more particularly with the meaning of section 118 there-

of, 84 Stat. 1689, 42 U.S.C. § 1857.[1] The Attorney General of Kentucky brought this action against various federal departments and agencies which operate facilities within the State that employ pollutant emitting quipment. Included among the defendants were the Secretary of the Army and various Army officers, the chairman of

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1. Section 118 provides:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

the Board of Directors of the Atomic Energy Commission (AEC) and various officials of that agency and the managing officers of the Tennessee Valley Authority (TVA). The complaint recited that a "Kentucky Plan" for implementation of air quality standards had been adopted, and approved by the Environmental Protection Agency (EPA), and that the plan included a regulation which requires the owners and operators of air pollutant emitting equipment to apply for and obtain from the Kentucky Air Pollution Control Commission (Commission) "a permit to operate their air contaminant equipment."[2] Stating that the defendants had refused to apply for and obtain such permits, the plaintiff asked for an order directing them to do so and that they be permanently restrained from refusing to comply with the provisions of section 118 of the Act.

Also named defendants were the Administrators of EPA and the regional administrator whose responsibility includes Kentucky. It was complained that these defendants had refused to initiate appropriate actions against the previously named defendants to require their compliance with the permit requirements of the Kentucky

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2. Administrative Regulation NO. AP-1, §5 provides:

(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect.

Plan. It was alleged that section 113 of the Act[3] requires the EPA administrators to proceed in the manner requested. The relief sought against these dfndants was entry of an order directing them to commence an action under section 113 to obtain full compliance by the other

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3. Section 113 (42 U.S.C. §1857c-8) provides, in part, as follows:

> (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.
>
> (2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—
>
> (A) by issuing an order to comply with such rement, or

defendants with the permit requirement. In addition, a declaratory judgment was sought to the effect that the defendant operators of federal facilities do not have the right to refuse to comply with the permit regulations of the Kentucky Plan and that the EPA defendants, with knowledge of widespread violations by the other federal defendants, do not have a right to fail to initiate appropriate action under section 113.

All defendants filed motions to dismiss or for summary judgment. The plaintiff also filed a motion for summary judgment and various parties filed affidavits in support of their motions. Although plaintiff did not concede that all the federal facilities in Kentucky are in compliance with air pollution emission standards or have adopted schedules which will bring them into compliance, the district court determined that resolution of this issue was not required for decision of the case. Upon consideration of the cross-motions, District Judge James E.

> (B) by bringing a civil action under subsection (b) of this section.
>
> The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person—
>
> (1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or
>
> (2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a) (1) of this section of a finding that such person is violating such requirement;

Gordon granted summary judgment to the defendants and dismissed the action.

The issues on appeal are narrow. In the first place, the appellant contends that section 118 of the Act "requires that those persons in charge of the administration and operation of air contaminant sources owned or operated by the federal government comply with all state requirements respecting the control and abatement of air pollution including Kentucky's permit requirements." The appellees maintain that section 118 requires compliance with substantive provisions of the Kentucky Plan, but does not compel federal officials to obtain state or local permits for the operaiton of federal facilities. It is the position of the appellant that the permit, requirement is substantive in nature because the Kentucky Plan is so formulated that the State cannot meet its primary responsibility under the Clean Air Act without the use of permits. To this the appellees respond that they are willing to supply, and in fact have supplied, the information sought on the permit application form, but will not seek the permit itself.

It is agreed by the parties that section 304 of the Act[4] provides a means by which the United States may

4. Section 304 (42 U.S.C. § 1857h-2) provides in pertinent part:

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

* * *

Definition

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

be sued for violation of an emission standard of limitation, or order with respect thereto. The appellant argues that this provision only permits abatement actions and that the Commission needs to be able to prevent air pollution as well as abate violations. It is maintained that the permit device is the only means by which the State can exercise preventive control over polluters. The language of section 304 does not require that suit be deferred until an actual violation of an established emission standard occurs. Sub-section (f) (1) clearly permits the filing of an action for violation of a schedule or timetable of compliance. Thus, it is not necessary under section 304, that the State or other aggrieved party wait until an emission standard is violated to bring suit. It may be done at the first instance where the owner or operator of polluting equipment fails to meet a level prescribed in a schedule or timetable of

compliance. Such an action would surely be preventive in nature.

Both the doctrine of sovereign immunity and the application of the Supremacy Clause of the Constitution are involved in the decision of this case. We view the action against the non-TVA defendants as a suit against the United States. The sovereign can only act through its agents. and the relief sought in this case does not seek to impose personal liability of the named defendants, but rather would affect public administration *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688-689 (1949); *Land v. Dollar*, 330 U.S. 731, 738 (1947). Every declaration of a waiver of sovereign immunity must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Section 118 contains no waiver and that included in section 304 does not permit suit to require owners and operators of federal facilities to obtain permits from a state agency in order to continue to operate. The two sections are part of the same Act and must be read together. By failing to include a separate waiver of immunity in section 118 Congress indicated that compliance with its provisions may be compelled by suit only to the extent permitted by section 304. This section provides ample means for enforcement of air quality and emission standards.

The TVA defendants do not claim sovereign immunity from suit, but do maintain that the Supremacy Clause of the United States Constitution exempts federal agencies and officials in the performance of their

duties from state and local regulations. From the time of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this has been a settled principle of our federalism. See *Mayo* v. *United States*, 319 U.S. 441, 445-448 (1943). The doctrine has been held applicable to TVA. *Posey* v. *Tennessee Valley Authority*, 93 F.2d 726, 727 (5th Cir. 1937). The appellant argues that Congress determined in this instance to submit federally owned and operated facilities to state regulation by providing, in section 118, that agencies of the federal government "shall comply" with state requirements. This does not necessarily follow. An examination of the legislative history of the 1970 Act reveals no congressional intent to subject federal instrumentalities and agencies to state administrative regulations. Separate House and Senate bills were interpreted in the respective Reports as requiring federal agncies to comply with applicable "emission standards" and the Joint Conference Report stated that the House bill and Senate amendment which became section 118 "declared that Federal departments and agencies should comply with applicable standards of air quality and emissions." This language appears to us to refer only to substantive requirements and not to encompass the Kentucky regulation which requires permits. In the absence of a clear congressional purpose to subject federal agencies to state regulation, the district court was prevented by the Supremacy Clause from granting the injunctive relief sought by the plaintiff.

The plaintiff also relies on Executive Order No.

11507 which was issued on February 4, 1970 as authority for the proposition that the federal agencies and instrumentalities sued here are required to obtain Kentucky permits. This Executive Order, while in force, was never so construed by the Environmental Protection Agency, as shown by documents filed in connection with the motions for summary judgment. Such administrative construction is entitled to great weight particularly when it is supported by the legislative history of the Act to which the Order refers. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). Furthermore, the order in question was superseded by Executive Order No. 11752 on December 17, 1973 which contains this policy statement:

> SECTION 1. *Policy.* It is the purpose of this order to assure that the Federal Government, in the design, construction, management, operation, and maintenance of its facilities, shall provide leadership in the nationwide effort to protect and enhance the quality of our air, water, and land resources through compliance with applicable standards for the prevention, control, and abatement of environmental pollution in full cooperation with State and Local governments. Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations, to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and cooperation in the prevention of environmental pollution. In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control.

We find no support in the language of Executive Order No. 11507 for an interpretaiton of section 118 in accord with plaintiff's contention, and such an interpretation is clearly negatived by the quoted portion of Executive Order No. 11752.

There has been a congressional waiver of immunity with respect to one group of defendants in this action, the EPA administrators. Section 304(a)(2) of the Act (42 U.S.C. § 1857h-2(a)(2)) provides for an action "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." The question here is whether the act or duty which the plaintiff sought to have the court order the EPA defendants to perform is mandatory or discretionary. This requires a consideration of the language of section 113 of the Act since the complaint demands that these defendants be "[o]rdered to commence appropriate action under Section 113" to obtain full compliance with the Kentucky Plan. A reading of section 113(a)(1) reveals that that Administrator *shall* give notice to persons in violation of hte plan, but that he *may* thereafter issue an order or bring

an action under subsection (b). The same language is used in section 113(a)(2), which deals with widespread violations of an implementation plan. Again, the Administrator is required to give public notice of his finding, but *may* enforce any requirement of the plan by issuing an order or commencing an action under sub-section (b). Section 113(b) uses only the discretionary "may"; the mandatory "shall" does not appear. The district court correctly held that it had no power to review the decision of EPA not to commence actions under scetion 113 since this was a decision on "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

A review of the Act as a whole supports the views set forth in this opinion. Congress clearly intended that federal facilities comply with the emission standards and limitatons of the state plan where they are located. Such compliance is mandated by section 118 and made enforceable by legal action pursuant to section 304. By defining the term "emission standard or limitation" broadly in section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation. The chief purpose of the Act are "to protect and enhance the quality of the Nation's air resources" (§ 101(b)(1)) and rapidly bring into being "a program to achieve the prevention and control of air pollution." (§ 101(b)(2)). We do not believe the congressional scheme for accomplishment of these purposes included subjection of federal agencies to state or local permit

requirements. Congress did commit the United States to compliance with air qaulity and emission standards and it is undisputed in this record that the federal facilities in Kentucky have cooperated with the Commission toward this end. The national dedication to improvement of the environment by prevention and control of air pollution is in no way impeded by exempting federal agencies from the permit requirement of Administrative Regulation No. AP-1, § 5.

The judgment of the District Court is affirmed.

OFFICE OF THE CLERK
JOHN P. HEHMAN
Clerk

* * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202

June 5, 1974

Mr. Ed W. Hancock
Mr. David C. Short
Mr. David D. Beals
Mr. Wallace H. Johnson
Mr. George J. Long
Mr. G. Wilson Horde
Mr. Robert H. Marquis
Mr. Andrew P. Miller
Mr. John L. Hill
Mr. Robert F. Trevey
Mr. Evelle J. Younger

Re: Commonwealth of Kentucky, ex rel., Ed W. Hancock, Attorney General, Plaintiff-Appellant,

vs.

William D. Ruckelshaus, Administrator of the Environmental Protection Agency, et al., Defendants-Appellees.
Case No. 73-2099

Gentlemen:

Enclosed is a copy of the Court's opinion which was announced today in the above-entitled case.

A judgment in conformity with the opinion has been entered today as required by Rule 36.

Yours very truly,

John P. Hehman, Clerk
/s/Grace Keller
Chief Deputy

Enclosure

73-2099

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CINCINNATI, OHIO 45202
JAMES A. HIGGINS, CLERK

IMPORTANT NOTICE

March 11, 1974
Filed 3/11/74

Mr. Ed W. Hancock, Attorney General
Messrs. Short & Beals
Mr. Robert F. Trevey
Messrs. Johnson, Gelin & Klarquist
Mr. George J. Long
Mr. G. Wilson Horde
Messrs. Marquis & Sanger
Messrs. Miller & Steger

Re:
[Title Omitted in Printing]

The above-styled case is set for oral argument on MONDAY, APRIL 8, 1974 in the Court Room of the United States Court of Appeals, U. S. Post Office and Courthouse, Fifth and Walnut Streets, Cincinnati, Ohio.

Please report to the Clerk's Office Room 608, by 8:45 A. M. The Court convenes at 9:00 A. M., Eastern Daylight Time.

JAMES A. HIGGINS
Clerk

Entered 6/5/74

Filed June 5, 1974

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 73-2099

COMMONWEALTH OF KENTUCKY,
EX REL., ED W. HANCOCK,
ATTORNEY GENERAL ——Plaintiff-Appellant,

vs.

WILLIAM D. RUCKELSHAUS,
ADMINISTRATOR OF THE
ENVIRONMENTAL PROTECTION
AGENCY, ET AL., ——.Defendants-Appellees.

Before: WEICK and LIVELY, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT
/s/John P. Hehman
Clerk

A True Copy.
Issued as Mandate 7/11/74

COSTS: Awarded to Appellees
Filing fee ——$——
Printing T.V.A. Brief $71.29
Total ——$71.29

Attest:
/s/John P. Hehman
John P. Hehman, Clerk

SUPREME COURT OF THE UNITED STATES
No. 74-220

Ed W. Hancock, Attorney General of
Kentucky, ... Petitioner,

v.

Russell E. Train, Administrator,
Environmental Protection Agency, et al.

Order Allowing Certiorari. Filed March 17, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein APPENDIX was filed with the Brief for appellant Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, in the office of the Clerk of the United States Supreme Court and served by mailing true copies hereof to: Honorable William B. Saxbe, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530; Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219; Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richomnd, Virginia, 23219; Honorable Evelle Younger, Attorney General State of California, 600 State Building, 217 West First Street, Los Angeles, California 90012; Honorable Foster Knight, Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General, Honorable Robert H. O'Brien, Assistant Attorney General, and Hon-

orable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 Honorable John L. Hill, Attorney General, State of Texas, Post Office Box 12548, Austin, Texas, 78711; Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas 78711; Honorable James F. Gordon, Judge, United States District Court For the Western District of Kentucky, United States Courthouse, Sixth and Broadway, Louisville, Kentucky 40202; Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio; and further it is hereby certified that all parties required to be served in this action have been served, all this the 29 day of April, 1975.

David D. Beals

David D. Beals
Assistant Attorney General
Commonwealth of Kentucky